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NOMINATION OF ANTHONY M. KENNEDY TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

THE NOMINATION OF ANTHONY M. KENNEDY TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

DECEMBER 14, 15 AND 16, 1987

Serial No. J-100-67

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NOMINATION OF ANTHONY M. KENNEDY TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, DECEMBER 14, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr., chairman of the committee, presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

The CHAIRMAN. Judge Kennedy, welcome. We are delighted that you are here and are anxious to get this hearing under way.

I would like to at the outset indicate how we are going to proceed. It has been the custom of the committee to not have a singular custom; that is, that ofttimes we have started with opening statements of Senators and then had those who were going to introduce the nominee introduce, and then move to the nominee. But in the interest of accommodating our colleagues, Senator Wilson and our colleagues from the House, what I would like to suggest we do before I make an opening statement is: I would ask Senator Wilson and my House colleagues if they would make opening statements. Then we will allow them to sit and listen to all of us, if they wish, for the next 1½ hours. Or if they have other business, we understand. Then I will make an opening statement, and all of us will endeavor to keep our statements relatively short. Then we will go to you, Judge; you will be sworn, go to you for an opening statement. If we are lucky, we will be able to do most of that before we break for lunch.

We are now planning on breaking from roughly 12 until 1, and I do not expect to go beyond 6 o'clock this evening. We will resume again tomorrow at 10 o'clock.

I want the record to show—I am told this is being televised—that all three of your children, those of whom are missing finals today, are in attendance. They have good reason not to be at their finals. I hope they are listening in California.

With that, let me yield, if my ranking member and colleague, Senator Thurmond, agrees, to Senator Wilson for an opening statement, and then move to our House colleagues.

Senator THURMOND. Mr. Chairman, I think that is fine to hear these people so they can be released if they do not care to stay.

Now, if they want to stay around and gain some wisdom from the Senators, that will be fine, too.

Thank you very much.

Senator LEAHY. Mr. Chairman, before you start, could I just note one thing, because a number of us are going to be doing this? So I will not have to be answering all kinds of phone calls from my office, a lot of us are on various committees of conference, and I think different ones will be going in and out during this hearing. I thought I would note that so that Judge Kennedy does not think that we suddenly left in dismay.

The CHAIRMAN. The Judge has some extensive experience in California, in the California legislature, and I know he knows how legislative bodies work. That is a good point to make. I know some of my Republican and Democratic colleagues will have to be absent at part of the hearing throughout. I know Senator Metzenbaum has business he has to attend to this afternoon. I know that you and many others are on a conference.

So, Judge, if, in fact, Senators are moving in and out, it is not out of lack of interest. It is additional responsibilities in the Senate that require them to do so.

Senator THURMOND. Mr. Chairman, we will be glad to excuse any of them, of course, just so they are here when the time comes to vote for Judge Kennedy. That is all that counts.

The CHAIRMAN. As usual, my colleague from South Carolina beats around the bush a lot.

Let me yield now to our colleague from California, Senator Wilson. Welcome, Senator.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman. I will avail myself of the opportunity to drink deep from the wisdom. I do have some time this morning, and I look forward to it.

I am particularly pleased—in fact, I feel privileged—to be able to introduce a long-time friend, but much more importantly an exceptional judge, one who gives promise of giving truly distinguished service on the Supreme Court of the United States. The committee is in possession of his background, his record, which is an extraordinary one. You know that he was a brilliant student, both as an undergraduate at Stanford, graduating Phi Beta Kappa, having completed all of the work required for his graduation by the end of his junior year so that he took his senior year at the London School of Economics. You know that he was a cum laude graduate of the Harvard Law School; that he was born and raised in Sacramento and, after his father's death, returned, having served 2 years with one of the best known, most prestigious San Francisco firms, to take over his father's practice in Sacramento. I will not dwell at length on that.

I was privileged to first know Tony Kennedy some 20 years ago when we were both young men—still, I hope, young at heart. He was a young lawyer practicing in Sacramento. I was a young member of the State legislature. A small part of his practice consisted of legislative advocacy, and it was in that role that I first

knew him. He was a very different kind of legislative advocate. He came to my office, and without my soliciting him to do so, he informed me not only who was for the legislation that he was proposing, but who was opposed to it and why in both cases. He anticipated my questions. He did not offer to buy me a drink. He did not offer to take me to dinner. He was a very good legislative advocate and, I think, an effective one, though I have read that it was not particularly a part of his practice that he enjoyed. But for those of us who were exposed to him, we quickly learned that this was a young man who obviously knew what it was that he was talking about, who disclosed everything, and who concealed nothing.

Judge Kennedy's excellent reputation as a lawyer became so well known in 1975 President Ford named him to the U.S. Court of Appeals for the Ninth Circuit. He was only 38 years old, one of the youngest lawyers ever honored by a Presidential appointment to the nation's second highest court. It was as a member of the ninth circuit that Judge Kennedy has authored hundreds of opinions, majority opinions, as well as some very important dissents, one of which I will dwell upon in a moment.

He has, through all the years of maintaining a very heavy judicial docket, found time to serve on a number of administrative panels for the improvement of the functioning of the federal judiciary, as well as upon the Committee on Pacific Ocean Territories. He has been a director of the Federal Judicial Center and a National Correspondent for Crime Prevention and Control with the United Nations.

Beyond his work on the bench, Judge Kennedy's dedication to the law has inspired him to teach at the McGeorge School of Law of the University of the Pacific, where he has been a distinguished professor since 1965.

It would be a gross understatement to say that Judge Kennedy has been well received by his students. Not only have they found him to be, in the words of one former student, "an excellent teacher" who commands a "brilliant intellect," but they also know him to be a very creative instructor. He reportedly has taken to conducting a lecture on the Constitutional Convention having assumed the persona of James Madison—complete with period garb.

What I was looking for a moment ago was the exact quote of one of his students, a Mr. Norm Scott, and I will have to paraphrase Mr. Scott. He said that it was clear that Judge Kennedy enjoyed the interchange, the interaction with his students, enjoyed teaching them to think. It was also true that, while he told them that they should respect the pronouncements of the Supreme Court, they should not accept them as gospel.

I think that it is clear from those who have known Judge Kennedy in one persona or another—whether as teacher or as a judge during his 12 years on the Court of Appeals—that he has demonstrated the highest intellect, a truly judicial temperament, great compassion.

I think, too, that it is clear from those that have known him, either as teacher or judge, that he has exhibited, in the courtroom as well as in the classroom, the belief that the Founding Fathers exercised the greatest care that the national government, and especially our federal courts, should play a properly limited role in the

lives of our citizens. We should expect no less care of any candidate for our nation's highest court, and in Judge Kennedy you will find that expectation fully met.

When a judicial candidate's qualifications are considered, one ever-present question is whether he or she possesses compassion. But too often, the test of compassion is focused too heavily on the candidate's concern for the accused, with little or no regard for society and little or no regard for the victim.

Justice does not simply demand protection of the rights of the accused; it demands as well the protection of the rights of those harmed. Until a verdict has been returned, the accused in a criminal case obviously is just that—the accused. But whether the accused being tried is ultimately adjudged guilty or innocent, we cannot ignore the fact that an innocent victim has been harmed: either deprived of property or, in the most egregious circumstance, forced to suffer the violence of rape or robbery or other assault, or even death.

Unfortunately, in the effort to respond to some past abuses of those accused by our criminal justice system, we have almost lost sight of the need to safeguard the rights of victims. Judge Kennedy has never lost sight of the need for our criminal justice system to seek justice for all those affected by crime, as he made clear in a speech delivered earlier this year in New Zealand. As he stated forthrightly, "[A] decent and compassionate society should recognize the plight of its victims."

In fleshing out this basic truth, Judge Kennedy went on to say that, "An essential purpose of the criminal justice system is to provide a catharsis by which a community expresses its collective outrage at the transgression of the criminal."

Clearly, that is what law-makers do in enacting criminal codes. We proscribe antisocial conduct and prescribe a penalty for the commission of a prohibited act; and we entrust the application of the laws to judges. That is why the role of judges is so important. As Judge Kennedy noted in his speech, "It does not do to deny the same catharsis to the member of the community most affected by the crime. A victim's dissatisfaction with the criminal justice system, therefore, represents a failure of the system to achieve one of the goals it sets for itself."

This failure which Judge Kennedy has noted occurs most often at retail, in the courts, when the application of the law achieves not justice, or the legislative intent of deterrence and catharsis, but frustration and distrust in the victim and in the public.

It is little wonder that victims often fail to report crimes, Judge Kennedy notes, for the criminal justice system's failure to care about victims is too well known and too often inspires in the public doubt that true justice will be done. Ultimately, victims and witnesses become indifferent to the need of the criminal justice system for their cooperation in the belief that the system has become indifferent to them.

Judge Kennedy's concern is appropriate not only for those of us entrusted with making the law, but also for judges who apply it. Certainly, it is appropriate for those whose duty it is to test it against the Constitution.

If the proper protections of the Constitution are stretched to the point where the criminal law provides inadequate and uncertain protection to the public, if our criminal justice system is perceived to be unjust, the demoralizing effects may well breed distrust, disrespect for the legal process, and a desperate resort to vigilante actions. The *Bernhard Goetz* case comes to mind.

Broadly stated, our exclusionary rule requires that if the constable blunders, the criminal goes free. The sad fact is that too often when the constable has made no willful blunder, the criminal has still gone free, even where evidence of guilt was entirely reliable.

And, again, the result in such cases has been that in seeking to curb and penalize unlawful police practices, our criminal justice system, through largely court-made law, has released the clearly guilty, to the outrage of the victim and to the peril of the public. This situation has been one that cries out for judicial application of a rule of reason to limit abuses.

Enter now Judge Kennedy—and reasonable balance.

In an exceptional dissenting opinion in the case of *United States* v. *Leon*, Judge Kennedy argued that a truly good-faith mistake by police should not lead to a criminal's release. What makes the opinion exceptional is that its persuasiveness ultimately led to its adoption by the Supreme Court.

It is this strict approach to the application of the fourth amendment that is necessary to restore effectiveness, fairness, and true compassion to our criminal justice system.

There are many issues that will be raised by the members of this committee during these confirmation hearings, drawing deep from the well of American law. But as the committee carries out its constitutional responsibilities, it will look, I am sure, to see whether or not Judge Kennedy's service on the Supreme Court will serve the interests of justice—which, in my judgment, it surely will—but as the committee seeks justice, it should also do justice both to the nominee and to the confirmation process.

At the President's announcement of his nomination, Judge Kennedy told reporters that this committee and the entire Senate have a duty to give the most careful scrutiny to his candidacy, and that he welcome such scrutiny. Mr. Chairman, I take pride in joining him in inviting that scrutiny.

Tony Kennedy's record as a lawyer, as a judge, as a teacher, as a human being, is an open book, and it is a story of an individual who has charted a judicial course of such distinction and soundness, of such consistency and reliability, that there should be little question of his exceptional qualifications to serve on the Court—as, indeed, the American Bar Association has found in giving him its highest rating. Therefore, I urge the committee to complete its work with both deliberation and alacrity, so that the Senate may consider Judge Kennedy's nomination at the start of the new year. I know that is the Chairman's intention. I congratulate him upon his having moved expeditiously to convene these hearings as early as he has.

Mr. Chairman, I will simply say that I think when you have completed your deliberations, and when the Senate has voted, we will have given the Supreme Court a distinguished new member, one who will reflect credit upon us and upon the President in having

made this nomination. More importantly, he will be a valuable addition. He has long years of service to give. His, I think, will be a truly extraordinary career, as it has been already.

Thank you, Mr. Chairman.

[The statement of Senator Wilson follows:]

STATEMENT OF SENATOR PETE WILSON
OF CALIFORNIA
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE -- DECEMBER 14, 1987

NOMINATION OF ANTHONY M. KENNEDY
TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT

Mr. Chairman and members of the Committee, I am extremely pleased to appear here today to introduce Judge Anthony M. Kennedy, who has been nominated by the President to serve as Associate Justice of the Supreme Court of the United States.

My state of California has been blessed with an abundance of legal talent, and the public has been well served by the willingness of the very best to serve there as judges.

Among the very distinguished judges at all levels of the judiciary in California, it has been known far and wide for many, many years that there is no more distinguished and talented member of this varied fraternity than Judge Anthony Kennedy.

Anthony Kennedy was born in Sacramento, California, on July 23, 1936. The son of a noted lawyer in the state capital, he grew up in Sacramento and then attended Stanford University.

At Stanford, Judge Kennedy was an excellent student. Not only did he graduate "with great distinction" in 1958, he was also elected to Phi Beta Kappa and Phi Sigma Alpha, the national political science honor fraternity.

During his senior year at Stanford, Judge Kennedy already had fulfilled the principal requirements for graduation and attended the London School of Economics and Political Science at the University of London.

Deciding to follow his father into a career as a lawyer, Judge Kennedy attended Harvard Law School, where during his final year he served as a member of the Board of Advisors of the law faculty. He received his law degree, cum laude, in 1961.

Judge Kennedy began his legal career at the noted San Francisco law firm of Thelen, Marrin, Johnson & Bridges. In 1963, upon his father's death, Judge Kennedy returned to Sacramento to assume his father's business law practice. Four years later, he formed a partnership, Evans, Jackson & Kennedy.

Judge Kennedy's Sacramento law practice was broad in scope. During his years as a solo practitioner, he handled twenty to thirty litigation matters per year, including criminal and probate cases. After forming his partnership in 1967, Judge Kennedy's practice for major clients was extensive, including corporate, tax, administrative, real estate, and environmental law, as well as legislation, estate planning and probate, and international legal transactions.

Judge Kennedy's excellent reputation attracted the attention of President Ford, who named him in 1975 to the United States Court of Appeals for the Ninth Circuit. At the age of 38, Judge Kennedy was one of the youngest lawyers ever honored by a presidential appointment to the Nation's second highest court.

As a member of the Ninth Circuit Court, Judge Kennedy has authored more than 300 majority opinions, as well as 100 concurring and dissenting opinions.

While maintaining a full judicial docket, Judge Kennedy has also served on a number of administrative panels of the federal judiciary, including the Judicial Conference's Advisory Committee on Codes of Conduct and its Committee on Pacific Ocean Territories. He is also a director of the Federal Judicial Center and a National Correspondent for Crime Prevention and Control with the United Nations.

Beyond his work on the bench, Judge Kennedy's dedication to the law has inspired him to teach at the McGeorge School of Law of the University of the Pacific, where he has been a professor since 1965. He has been a distinguished teacher of the law.

It would be a gross understatement to say that Judge Kennedy has been well received by his students. Not only have they found him to be, in the words of one former student, "an excellent teacher" who commands a "brilliant intellect", they also know him to be a creative instructor. He reportedly has taken to conducting a lecture on the Constitutional Convention having assumed the <u>persona</u> of James Madison -- complete with period garb.

I have been privileged to know Tony Kennedy for more than 20 years, since we first met in Sacramento -- where, as I noted, he was born and raised, and where I had come to begin my political career in the state Assembly.

During his 12 years on the Court of Appeals, and indeed during his entire life, Tony Kennedy has shown himself to possess the highest intellect, temperament, and compassion.

Furthermore, as the Committee considers Judge Kennedy's nomination to serve on the Supreme Court, your review of his service on the Court of Appeals will leave no doubt that he subscribes to the conservative principles which the framers of our Constitution adopted 200 years ago.

He knows that our Founding Fathers exercised great care that the national government, and especially our federal courts, should play a properly limited role in the lives of our citizens. We should expect no less care of any candidate for our Nation's highest court, and in Judge Kennedy you will find that expectation fully met.

When a judicial candidate's qualifications are considered, one everpresent question is whether he or she possesses compassion. But too often the test of compassion has focused too heavily on the candidate's concern for the accused, with little or no regard for society, and with little or no regard for the victim.

Justice does not simply demand protection of the rights of the accused. Justice also demands the protection of the rights of those harmed. Until a verdict has been returned, the accused in a criminal case is just that -- the accused. But whether the accused being tried is ultimately adjudged guilty or innocent, we cannot ignore the fact that an innocent victim has been harmed -- either deprived of property, or in the most egregious circumstances, forced to suffer the violence of rape or other assault, or even death.

Unfortunately, in the effort to respond to some past abuses of those accused by our criminal justice system, we have almost lost sight of the need to safeguard the rights of victims.

Judge Kennedy has never lost sight of the need for our criminal justice system to seek justice for all those affected by crime, as made clear in a speech he delivered earlier this year in New Zealand. As he stated forthrightly, "[A] decent and compassionate society should recognize the plight of its victims."

In fleshing out this basic truth, Judge Kennedy went on to say that, "An essential purpose of the criminal justice system is to provide a catharsis by which a community expresses its collective outrage at the transgression of the criminal."

Clearly that is what law-makers do in enacting criminal codes. We proscribe anti-social conduct and prescribe a penalty for the commission of prohibited acts -- and we entrust the application of the laws to judges. That is why the role of judges is so important. As Judge Kennedy noted in his speech, "It does not do to deny that same catharsis to the member of the community most affected by the crime. A victim's dissatisfaction with the criminal justice system, therefore, represents a failure of the system to achieve one of the goals its sets for itself."

This failure occurs most often at retail, in the courts, when the application of the law achieves not justice, or the legislative intent of deterrence and catharsis, but frustration and distrust in the victim and in the public.

It is little wonder that victims often fail to report crimes, Judge Kennedy notes, for the criminal justice system's failure to care about victims is well known, and too often inspires public doubt that true justice will be done.

Ultimately, victims and witnesses become indifferent to the need of the criminal justice system for their cooperation, in the belief that the system has become indifferent to them.

Judge Kennedy's concern is appropriate not only for those of us entrusted with making the law, but also for judges who apply it. Certainly it is appropriate for those whose duty it is to test it against the Constitution.

If the proper protections of the Constitution are stretched to the point where the criminal law provides inadequate and uncertain protection to the public, if our criminal justice system is perceived to be unjust, the demoralizing affects may well breed distrust, disrespect for the legal process, and a desperate resort to vigilante actions. The Bernhard Goetz case comes to mind.

Broadly stated, our exclusionary rule requires that if the constable blunders, the criminal goes free. The sad fact is that too often when the constable makes no willful blunder, the criminal has still gone free, even where evidence of guilt was entirely reliable.

And again, the result in such cases has been that in seeking to curb and penalize unlawful police practices, our criminal justice system, through largely court-made law, has released the clearly guilty -- to the outrage of the victim and the peril of the public. This situation has been one that cries out for judicial application of a rule of reason to limit abuses.

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It is this strict approach to the application of the Fourth Amendment that is necessary if we are to restore effectiveness, fairness, and true compassion to our criminal justice system.

There are many issues that will be raised by the members of this committee during these confirmation hearings, drawing deep from the well of American law. But as the Committee carries out its constitutional responsibilities, it should not only look to see if Judge Kennedy's service on the Supreme Court will serve the interests of justice -- which it surely will -- but as the Committee seeks justice, it should also do justice, both to the nominee and to the confirmation process.

At the President's announcement of his nomination, Judge Kennedy told reporters that this Committee and the entire Senate have a duty to give the most careful scrutiny to his candidacy -- and that he welcomed such scrutiny. I take pride in joining him in inviting that scrutiny.

Tony Kennedy's record as a lawyer, as a judge, and as a human being is an open book, and it is a story of an individual who has charted a judicial course of such distinction and soundness that there should be little question of his exceptional qualifications to serve on the Court. Therefore, I urge the Committee to complete its work with both deliberation and alacrity, so that the full Senate may consider Judge Kennedy's nomination at the start of the new year.

The CHAIRMAN. Thank you.

Representative Fazio, thanks for coming to the other body. We appreciate it. It is interesting to note that your Republican colleague from the Senate is here, and you, a Democrat, are here, both to speak on behalf of Judge Kennedy. Please go forward.

STATEMENT OF HON. VIC FAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. FAZIO. Thank you, Mr. Chairman.

Members of the committee, it is a great pleasure and an honor to join my colleagues, Congressman Bob Matsui and Senator Pete Wilson, in presenting Judge Anthony M. Kennedy for your consideration to fill the current vacancy on the Supreme Court.

I come before you as Judge Kennedy's friend, a former neighbor, and as one of two members of Congress who have the privilege of representing the city of Sacramento where Judge Kennedy grew up and where he has resided for the last 24 years.

I also represent Solano County, California, which produced the last Supreme Court nominee from the Ninth Circuit Court of Appeals, Judge Joseph McKenna. Judge McKenna was nominated to the Supreme Court by President McKinley and confirmed for appointment to the high court in January of 1898. Judge Kennedy, who is quite a historian, has informed me that Judge McKenna, a former district attorney, promptly repaired to the Columbia University Law School for a refresher course. One wonders how the ABA might have reacted in 1988 to that kind of activity by a prospective member of the Supreme Court.

The CHAIRMAN. As long as they came east, they probably would have been satisfied.

Mr. FAZIO. East of the Mississippi.

Judge Kennedy, in my view, has long possessed all of the qualities and qualifications needed to make an outstanding Associate Justice.

As a youth, Tony Kennedy displayed an early interest and appreciation for the law and our judicial system. At the early age of 10, he began working around his father's law office and began accompanying his father to trials throughout northern California.

I do not have to recount his academic record. Senator Wilson has outlined it for you. But it is important to point out that during his time on the bench and in the classroom, Judge Kennedy has earned the respect of his peers and the admiration of his students for his commitment to excellence, his spirited eloquence, and his unparalleled understanding of the Constitution. He has also proven himself to be an active and concerned member of our community, active in organizations and projects from his local Catholic Church to Little League Baseball, while performing pro bono legal work for a number of entities, including Plaza de Las Flores, a project of the Sacramento Mexican-American community.

A highly respected local attorney, the former President of the California State Bar, and principal partner of the firm Diepenbrock, Wulff, Plant and Hannegan of Sacramento, Forest A. Plant, perhaps summed up Judge Kennedy's overall qualifications best when he wrote:

Judge Kennedy is extremely industrious; he is highly intelligent; . . . he has a profound knowledge of the evolving Constitution as evidenced not only by his decisions but by his years of teaching the subject at the law school level; he is objective and even-handed in decision-making and is sensitive to the concerns of all parties involved in the particular litigation. He is not doctrinaire or inflexible in the discharge of his judicial duties. Above all, he has exhibited a profound faith in our judicial system and the central importance of the Constitution in that system.

In my view, if confirmed, Judge Kennedy will show judicial restraint on the Supreme Court just as he has for the last 12 years on the court of appeals. But that does not mean that he is hostile to individual rights. The kind of judicial restraint which typifies Judge Kennedy's record in the court, his lectures in the classroom and his statements in both public and private, respects precedents which some feared previous nominees would ignore; it respects our institutions and expects change to occur not always through the courts but through the efforts of the people and their representatives as well.

The rights which we all take for granted, the rights of privacy, of freedom of expression and freedom from arbitrary government action, are all well established under current law and, I believe, would be safeguarded and honored by Judge Kennedy.

But Tony Kennedy, nonetheless, is a conservative. He is a man with common sense value, a middle class lifestyle, and a traditional sense of judicial restraint.

Mr. Chairman, members of the committee, it is a pleasure for me to give Judge Kennedy my highest recommendation and to convey to you the sense that the community in which Judge Kennedy has worked and lived for most of his life takes great pride in his accomplishments and has great hope for his elevation to the highest court in the land.

At this time, Mr. Chairman, I would like to submit for the record a letter from Gordon Schaber, Dean of the McGeorge Law School of the University of the Pacific, where, as has been indicated earlier, Judge Kennedy has taught for the last 23 years. Dean Schaber, an active Democrat, gives Judge Kennedy his strong recommendation, and states that Judge Kennedy would, as an Associate Justice, "serve this country in the highest tradition."

[The letter of Dean Schaber follows:]

McGEORGE SCHOOL OF LAW

UNIVERSITY OF THE PACIFIC 3200 Fifth Avenue, Sacramento, California 95817

WRITER'S DIRECT DIAL NUMBER

(916) 739-7121

DEC 03 1987

December 2, 1987

Honorable Vic Fazio
Member of Congress
1421 Longworth Building
Washington, DC 20515

FEDERAL EXPRESS

Dear Vic:

I write to you to restate my personal support for the confirmation of Judge Anthony M. Kennedy as a member of the Supreme Court of the United States.

I knew about Anthony Kennedy before he was solicited by me for an adjunct teaching position at the McGeorge School of Law of the University of the Pacific some twenty-three years ago. As a youngster, his curriculum in his elementary school could not hold him and absorb all of his intellect and energies. At the age of ten years, he began to work almost full time in the State Senate as one of the first pages to be employed in California. Simultaneously, he began accompanying his father to trials throughout the northern part of the State and worked around the law office. He did a great deal more of this prior to the time he attended college.

He gathered an outstanding scholastic record at Stanford University and during his course of law study at the Harvard Law School.

When his father passed away, I know that he faced an important decision as to whether to remain in the well-known San Francisco law firm in which he had already made a mark, or whether to come to his home, not only to settle family affairs but to continue the private practice of his father. The law offices were located in the same building where I was practicing

law prior to my service as the Presiding Judge of the Superior Courts of California for Sacramento County.

I had the opportunity to observe his skills in private practice. He was known for his grasp of an immense scope of legal subjects and tremendous capacity in an era when the generalist lawyer was much more common than is the case today. Further, he proved to be a skilled trial lawyer. Distinguished members of the bar associated him for that purpose. He engaged in the practice of administrative law, participated in transnational practice for corporations doing business abroad, and wrote complex Wills and Trusts, not only for his own clients but by referral from other lawyers.

It was a comfort to see that at the time of his appointment as a Judge of the Court of Appeal for the Ninth Circuit he came to it with a demonstrated capacity in the private practice of law.

Of course, having been aware of his intellect and talents, I early siezed upon his return to Sacramento to solicit interest in teaching. During these past twenty-three years, that decision has proven to be one of my finest. The factors for approval of law schools of the American Bar Association promote the notion of members of the bench and bar participating in the teaching program. His participation has demonstrated his superior intellect, his capacity for scholarship, his profound knowledge of the evolving Constitution, his objectiveness and his even-handed manner in decision making, and his sensitivity to the concerns of all parties in a particular case.

He has a tremendous intensity about his teaching and his work. Our students regularly applaud his presentations during the course of the academic year. Both in the classroom and in public arenas, he is simply one of the best public speakers that I have had the privilege to hear. At the recent dedication of the new Courthouse for the Ninth Circuit in Pasadena, California,

a number of judges present said that his speech was the best of its kind that they had ever heard.

His reputation for judicial temperament and personal qualities is excellent. I think the enclosed article from the Sacramento Bee of Sunday, November 29, 1987 says a great deal from a person in a vantage point similar to ours as Democrats.

At the time of his installation as an Appellate Court Judge, I stated that he was a gentle family man, a public contributor and an intellectual who could have his head high in the clouds but that at all times he had his feet firmly planted on the ground, with empathy for the problems of all of our citizens. He would serve this country in the best tradition. As I see it, he will become a consensus builder, consider issues case by case, and have an abiding respect for legal precedent.

Very sincerely yours,

Gordon D. Schaber, Dean

GDS/db

Enclosure

Mr. FAZIO. In addition, Mr. Chairman, I would like to submit for the record an article published in the Sacramento Bee by John Oakley, a self-described liberal, a Democrat, and a professor at the University of California's Martin Luther King Law School in Davis. Mr Oakley writes that Judge Kennedy's "opinions show great concern for consensus and consistency, for the will of the community made public and coherent through the medium of the law." My friend John Oakley concludes: "Judge Kennedy will fit solidly in the center of the Supreme Court. That is right where we need him, and right where he belongs."

[The article of John Oakley follows:]

Forum

The Sacramento Bee Sunday, November 29, 1987 Editorials 4

A liberal Democrat's case for Judge Kennedy

By John B. Oakley
Special to The Bee

THE GENIUS of a country is measured by its institutions, not by its individual citizens. Social institutions are just groups of people, of course, organized systematically to continue the institution even as the people constituting it come and go, one at a time, like the planks of a boat rebuilt entirely at sea. But the mark of institutional genius is the ability to produce the right individual when the need is great. Some planks are more important than others.

Supreme Court Justices are rather crucial planks in our ship of state. We greet the occasion of their replacement with a general call to quarters, and we have commissioned part of the crew to check the captain's choice with unusual care. Just where a justice fits is somewhat mysterious, but we know it has something to do with keeping us on course even if we don't know just where we want to go. Faced with this mystery, we want to make sure that the justice is made of good timber. Beyond that we must trust to the genius of our institutions.

In my opinion the nation has been well served by the nomination of Judge Anthony M. Kennedy to sit on the Supreme Court. Our institutions, conceived in genius 200 years ago in Philadelphia, still operate in a way that would make their framers proud. We, too, should be proud that this selection for the court was in a very real sense an *institutional* choice. Judge Kennedy was not the choice of any one person, party or faction. He was a choice dictated by the structure of our institutions. His nomination for the Supreme Court shows that those institutions are working well.

Clearly it was imperative that this nominee be a person of the highest personal probity. It was also important, in my opinion, that the nominee have the sort of judicious temperament and judicial philosophy that would command broad, bipartisan support.

The defeat of Judge Bork's confirmation was healthy for our judicial system because it focused attention on the process of constitutional interpretation and the need for social consensus upon which the legitimacy of law so vitally depends. It was also a reminder that the process of seating a justice on the Supreme Court is an explicitly political one in which the legislative and the executive branches of government can and should play co-equal parts. Vigorous senatorial testing of presidential appointees to the Supreme Court is an important part of the Constitution's system of checks and balances in the exercise of governmental power. But to have the Borkian battle repeated, with the possibility of narrow confirmation of a justice unpalatable to much of the country, or alternatively to have a bitter confrontation over senatorial refusal to hold confirmation hearings until after the 1988 elections, seemed to me to threaten a degree of intrusion of politics into the work of the Supreme Court likely to cause long-term harm to an institution that is at once our most noble and our most fragile. That threat seemed to be materializing until Judge Ginsburg withdrew, and so I was relieved and thankful when it was Judge Kennedy whom the president next asked to step into the public spotlight.

On the basis of 10 years of working with Judge Kennedy, not as a lawyer appearing before him but as a fellow law teacher interested in jurisprudence and judicial administration, I am an enthusiastic supporter of his confirmation. I hold this view despite my lifelong affiliation with the Democratic Party. I last worked for the federal government as a civil rights lawyer in the Carter administration. As a lawyer I have just one client, who lives at San Quentin under sentence of death. On most of the issues of the day to which the label is applied, I would be classified as a "liberal." Since Judge Kennedy is supposedly a "conservative," I have some explaining to do.

I mentioned earlier that unimpeachable probity and a comfortably "mainstream" temperament and philosophy about the job of a judge were the key characteristics required of the president's third nominee to replace Justice Powell. I'm going to touch on each of these criteria in justifying my whole-hearted support for Judge Kennedy despite our differing political affiliations.

Judge Kennedy's personal probity is not seriously questioned, except with regard to his past membership in San Francisco's Olympic Club, a private organization that has excluded women and minorities from membership. Surely the extent of his involvement in the club and his views on its membership policy will come up in the course of the strict senatorial scrutiny that he has welcomed. Although it is not a subject I have discussed with Judge Kennedy, I doubt he favored the exclusionary policies. Sexism and racism are difficult attitudes to conceal over 10 years of interaction, and I have never seen or heard from him a hint of such attitudes. His membership in a controversial private club may indicate some sympathy with the idea of privacy, however, and so there may be some silver to be found in or around the one arguable cloud on the record of his personal and private life.

John Oakley is a professor of law at the University of California, Davis.

2. The reputation of Tony Kennedy as a thoroughly nice person is widespread and deserved. My own dealings with him began when I was barely 30 years old. My academic work led me to be named to a committee on judicial administration on which Judge Kennedy also served. He was just past 40, bright, energetic and enthusiastic. He occupied a very powerful position, and was the envy of lawyers decades his senior in age. Yet he wore the mantle with humility and humor.

One Saturday morning we drove to San Francisco together for a committee meeting. On the way home my car broke down, much to my mortification. To Judge Kennedy this was the most ordinary predicament in the world. Which, of course, it was — but I for one take heart in the knowledge that a future Supreme Court justice is familiar with life as the rest of us live it. It had been a long day by the time we parted company. My companion was patient and sympathetic. I never heard a word of complaint.

That level-headedness is characteristic of Judge Kennedy, and was evident during the roller-coaster ride leading to his nomination. You may remember that when President Reagan first prepared to announce a nominee to send forward in lieu of Judge Bork, his choice was widely supposed to be Judge Kennedy. Only on the very morning of the announcement did the White House resolve to pick Judge Ginsburg instead.

For every lawyer I know (save Judge Kennedy), and for almost any lawyer I can imagine, this dramatic sequence of boom and bust would have been more than modestly depressing. What did Judge Kennedy do? He flew back to Sacramento, issued a set of gracious statements, and then flew on court business to American Samoa, of all places. That may sound exotic, but trace it on the map, and in your mind.

In the past week you have flown back to Washington, been announced to have ascended to the pinnacle of your profession by every pundit in the news media, the next night you fly back to Sacramento while the rest of the country is talking about Douglas Ginsburg, then you fly through a parade of time zones and across the international date line, catching planes at all hours of the night, and after four days you make your way back through the same maze of airports to Sacramento.

When you cross the international date line, west to east, you generally fly through the night and arrive on the morning of the day you departed. That proved a pretty accurate metaphor for Tony Kennedy's week. He's exhausted, so what does he do? Just what he had promised to do. He goes with his wife to the Kings' game. It's the first game of the new season, and Sacramento wins. The next morning, at 6 a.m., the White House calls. One more plane ride. This time the trip home was much easier. The new season is looking good for Sacramento.

The temperament of a good judge consists of more than a pleasant demeanor and clean personal living, of course. It entails a distinct attitude toward people, and toward the disputes they bring to court: that the law is the measure of the rights and duties of people that a court will enforce. This attitude requires that the irrelevant details of people's lives not count for or against them in court. It also requires that the job of determining what the law is be undertaken seriously, without underestimation of the degree to which the process of finding the law may be subjective and the determination of what the law requires may be controversial. Kennedy's record of opinions as a federal appellate judge makes clear that he does not decide cases by cues, stretching to reach liberal or conservative outcomes. He looks closely at the facts, and the results he reaches defy easy generalization because they are so sensitive to the differences between individual cases.

In the course of 12 years he has decided some major points of law, however, and his methodology for deciding controversial issues of law deserves close examination. In my view, he is committed to the legal tradition of our country, to a tradition of judicial review of the constitutionality of legislative and executive action, to a tradition of constitutional protection of individual rights, and to a tradition of genuine respect for the authority of precedent that regards the overruling of precedent as occasionally necessary but always regrettable.

JUDGE KENNEDY is often described as a conservative judge; he describes himself as a firm proponent of "judicial restraint." These are grounds for worry on the part of liberals. Many features of American law that liberals applaud — such as the desegregation of state school systems by federal court decree; the exclusion of illegally seized evidence from use in criminal trials; the outlawing of malapportioned legislative districts under the rule of "one man, one vote"; the banning of school prayer; the right to have an abortion in the early stages of pregnancy — have been introduced into our law by court opinions rather than legislation. Many conservatives have decried such cases as offensive to the concept of judicial restraint. Would Judge Kennedy seek to overturn these precedents? We need to think more about what "judicial restraint" means before we can venture a guess.

The problem is to determine if the call for "judicial restraint" is really a call for conservatism in the *process* by which judges decide cases, or is rather a protest that the *substance* of past court decisions has been inconsistent with conservative political values. On its face the doctrine of judicial restraint deals with how judges make their decisions, not with what those decisions are. Judicial restraint insists that improving the law is the province of the legislature and the legislative process for amending the Constitution. Thus the believer in judicial restraint ought, in principle, to disagree with a decision that goes beyond existing law even if the decision is an improvement of the law and makes our society the better for it.

Advocates of judicial restraint sometimes make just this claim. They say they support the *effects* of groundbreaking Supreme Court opinions, especially those regarding minority rights and the policing of elections, but object nonetheless to these opinions as departures from judicial restraint. The role of the courts, they say, is to apply the law and not to invent it; when judges make up the law they act without judicial restraint, and it is no excuse that the law they make up is better law than the law we truly have. It is this law, the true law as honestly found in the text of statutes and the Constitution and common law precedent, that judges should respect and not rewrite.

Liberals have learned to suspect such protestations that conservative attacks on the Supreme Court spring from concern for judicial restraint regardless of the merit of the law the court has announced. Many controversial opinions recognizing rights against government greater than those previously

STEPPING STONES

found in the Constitution have been joined in by judges whose careers would seem to define the concept of judicial restraint — such as Justice Frankfurter, who declared segregation unconstitutional in *Brown v. Board of Education*; Justice Harlan, who joined in the court's unanimous reaffirmation of *Brown* just two months after he took his seat on the court; and Chief Justice Burger, who declared abortions to be constitutionally protected in *Roe v. Wade*. If judges who exemplify judicial restraint nonetheless decide that the law really does confer the previously unrecognized rights enforced by controversial new decisions, what can account for conservative apoplexy about these decisions other than hostility to the substance of the rights these trusted judges have declared to exist?

Thus liberals have come to see the cry of "judicial restraint" not as a genuine commitment to keeping adjudication distinct from legislation, but rather as a disingenuous expression of hostility to the very idea that individuals have rights that the Constitution does protect against state interference. Is Judge Kennedy's avowed commitment to "judicial restraint" merely a pretense for hostility to individual rights?

I think not.

A judge who champions "judicial restraint" might be conservative in either (or both) of two senses: 1) conservative in the judicial sense that limits how broadly judges should decide controversial cases, particularly when the controversy is over the meaning of the vague or ambiguous clauses of the Constitution; or 2) conservative in the political sense that takes a dim view of the rights people ought to have to live their lives independently of the wishes of a majority of their community. A judicial conservative might be a political liberal, in the mold of President Roosevelt's appointee, Felix Frankfurter. Or a judicial conservative might be a political conservative, in the mold of President Eisenhower's appointee, John Harlan. A judicial "liberal" — an "activist" judge who thinks cases should be decided as a matter of justice rather than law — might also be a political liberal, in the mold of President Roosevelt's longest-lived appointment, William O. Douglas. And certainly an "activist" judge might be a political conservative. This is what Judge Robert Bork was thought to be, and why he was denied confirmation.

It was feared that Bork would treat the ambiguity and vagueness of the Constitution as blank pages on which to write his personal political values. Bork did not claim that this was his ambition. Instead he argued that the Constitution should be given its intended meaning. But the effect of his theory of "original intent" seemed to be to create blank pages where others saw none, by overruling decades of accumulated precedent and finding in the tea leaves of original intent support for a stingy view of individual rights.

My dealings with Judge Kennedy convince me that he would follow in the steps of Harlan and Frankfurter, not of Douglas, or Bork or Judge Ginsburg, who was thought likely to sit for as long as Douglas, and to be as conservative an activist judge as Bork. Kennedy's belief in judicial restraint is founded in his fear of unbounded power. The judicial power, he believes, is the least checked and balanced of the three branches of the federal government. A judge who seizes every opportunity to recast the law in the image of justice rides an unruly horse. Occasionally the task of interpreting the text and precedent of the law requires some appeal to morality, most classically in construing such majestically vague clauses of the Constitution as those guaranteeing "due process" or "equal protection." These are moral concepts, and to that extent disputes about their meaning and application require moral elaboration. But such cases should be decided with great caution, and full awareness that judges, like all other officials, are prone to the temptations of power.

The National Organization of Women has announced its opposition to Judge Kennedy, and has proclaimed that his confirmation would be a "disaster" for the civil rights of women and minorities. I think NOW is wrong in its evaluation of his record. His opinion, for a unanimous panel of three judges, that Congress has not yet required employers to pay salaries to women equal to those paid to men for jobs of "comparable worth," admittedly a setback to obtaining economic equality for women through litigation, cannot fairly be condemned as a distortion of the law. Far from being uncontroversial, the proposition that *existing law* prohibits employers from passively profiting from sex discrimination (which comparative worth theorists find endemic in the prevailing market wage levels of predominantly female jobs) has been accepted by no judge other than the lower court judge reversed by Judge Kennedy and his two colleagues.

Although I have some concerns about the economic mechanics for measuring comparative worth, I agree that our society would be a more just society if employers paid wages untainted by the market's lower valuation of traditionally "women's work." I would vote for a well-conceived comparable worth scheme. I consider myself a liberal, and liberals stand ready to use the engine of government to achieve economic justice. I don't know if Judge Kennedy would vote at the polls for a comparative worth scheme. I suspect he wouldn't. Republicans tend to be political conservatives, and political conservatives tend to oppose using state power to improve, rather than to protect, how a society's wealth is distributed among its members.

The National Organization for Women should campaign hard for supporters of comparable worth to be elected to Congress. If Tony Kennedy were running for Congress, NOW should oppose him unless he agreed to support a comparable worth amendment to our existing civil rights laws. But he is not running for Congress; he is up for confirmation for the Supreme Court. I don't think he should be faulted for failing to find that comparable worth is not already part of our law. Only an "activist" judge would find that it is. And certainly Democrats and liberals, whatever their special interests and personal values, cannot complacently assume that all activist judges share the liberal vision of social justice.

Mr. FAZIO. I believe it is time to unite the Senate, and thereby the country, behind a man who has proven himself to his profession and his community, the capital of California. He has earned the respect and support of Sacramento, just as I am sure that Justice Lewis Powell earned that of the people of his State's capital, Richmond, during his many years of practice there. Anthony Kennedy is the right man to take up the responsibility that Justice Powell has set down. I urge you to send his nomination to the full Senate with your unanimous endorsement.

The CHAIRMAN. Thank you, Congressman. The two references you made will be placed in the record as if read.

Mr. FAZIO. Thank you very much.

The CHAIRMAN. Congressman Matsui, welcome. Nice to have you here. Please proceed.

STATEMENT OF HON. ROBERT T. MATSUI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MATSUI. Thank you very much, Mr. Chairman.

I would like to join my colleagues, Senator Wilson and Representative Fazio, in introducing Judge Kennedy and also give him my highest endorsement for his nomination to the U.S. Supreme Court.

I noticed an editorial in the New York Times this morning that made reference to the two nominees that preceded Judge Kennedy, Judge Bork and Judge Ginsburg. It is too bad that two individuals preceded Judge Kennedy for this nomination. I say it is a shame because we should not be here today comparing Judge Kennedy to his two previous nominees.

Judge Kennedy in and of himself is a superb candidate for the U.S. Supreme Court, and comparisons do not do this gentleman justice. He has a deep compassion for the law, as many of you know. He is highly intelligent; from his academic record, we can discern that. His experience, 12 years on the appellate court in California, demonstrates a level that very few nominees to the U.S. Supreme Court demonstrate.

Obviously, Judge Kennedy is a conservative, and Representative Fazio and myself are here as Democrats. We support him because of our personal knowledge of Judge Kennedy. I look back to Sacramento County, where he and I grew up, and I can talk to any of the 1 million people in Sacramento and not one of them would have anything negative to say about this candidate. One individual, when asked by a reporter what they thought of him, said they noticed a lack of an observable ego. Judge Kennedy is a man of humility; he is a man of compassion. He is an individual that really has no ego and who will understand the plight of the common man when matters come before this court.

I would also have to say that even though he is a conservative and Representative Fazio and I are moderates to liberals, we have a great deal of confidence in Judge Kennedy in terms of what he will do on the U.S. Supreme Court. If one looks at his opinions, one will notice that he demonstrates judicial restraint. But in 1987, that makes a lot of sense. It means that he probably will not be overturning many of the decisions of the 1950s, 1960s, 1970s and

1980s. As a result, you will have stability on the court, which I think all of us in the United States desire today.

Let me make one further observation. In the next few days, you will hear testimony from a gentleman for whom I have a great deal of admiration. The gentleman is from Sacramento. His name is Nathaniel Colley. Nathaniel Colley is a black lawyer. He was former general counsel of the NAACP. He was born in Alabama, came to Sacramento, opened up his law practice, and became truly one of the prominent lawyers in the United States and one of the great trial lawyers in the State of California. I would like you to read or listen to his testimony when he gives it because that testimony will demonstrate the regard that lawyers, law students and ordinary individuals have for Judge Kennedy.

I heartily endorse his nomination to the U.S. Supreme Court. You could not make a better selection.

Thank you.

OPENING STATEMENT OF CHAIRMAN JOSEPH R. BIDEN, JR.

The CHAIRMAN. Thank you very much, Representative. As I indicated to my three colleagues, you are welcome to stay. We will now move to opening statements from me and my colleagues, but any time you have to absent yourself, we understand. We want to thank the three of you for coming over and being so eloquent in your support of Judge Kennedy.

This committee last assembled to consider the Supreme Court nomination on the eve of the 200th anniversary of the Constitution's drafting, and our discussion with the previous nominee and other witnesses was vigorous, educational and, I believe, ultimately enlightening. In sum, it was a discussion that I and most of my colleagues believe was worthy of the momentous anniversary that we were at that very moment celebrating.

Today, there is a calmer atmosphere. The confrontational spirit that characterized the last two nominations has passed as well. But make no mistake about it: at this moment in history, the Senate's decision on this nomination is every bit as important as our decision on the nomination of Judge Bork or anyone else. For if we are to do our job, and if you are to be confirmed, Judge Kennedy, you will occupy the same position of responsibility and power to which Judge Bork and Judge Ginsburg were nominated.

Our tradition of evolving liberty is just as much at stake today as it was when Justice Powell resigned in July. So once again, we meet to discuss the meaning of the majestic phrases of our greatest document, the Constitution; phrases that Justice Harlan knew cannot "be reduced to any formula"; a document that Chief Justice Marshall foresaw was "intended to endure for ages to come and consequently to be adapted to the various crises of human affairs."

Through that document, the Supreme Court holds far-reaching power over the constitutional rights and the daily lives of every American citizen. Accordingly, our role of advice and consent demands from every Senator a thorough and careful review, even with nominees of sterling character and qualifications, as you obviously have, Judge Kennedy. This careful review is not an expres-

sion of doubt about you, or any nominee, but a recognition of our obligation under the Constitution.

As someone said this morning, as I turned on the television: "I hope we have ended, once and for all, the debate as to whether or not this committee has the right to delve into the judicial philosophy and constitutional grounding of any nominee."

In the past, I, and many other Senators of both parties, had been frustrated with the confirmation process for some Supreme Court nominees. The Senate was being asked, in effect, to waive through nominees to the highest tribunal in America, largely on faith, sometimes on the assertion that the President wanted the person, and surely, in my opinion at least, the framers did not intend this institution in the United States Senate to bestow such monumental powers after such cursory examination.

In contrast, when we considered the last nomination, every one of us, literally every one of us on this committee, carefully reviewed the nominee's full record of constitutional and judicial thinking. And the heart of that review took place during the committee's hearings. Each Senator on the committee reached his own conclusion about what those views are, and are not; what they were and were not; whether they are or whether they are not acceptable for a Supreme Court Justice to hold.

And that review process begins again with your nomination, Judge. We have spent the past month reviewing all 438 of your opinions that you wrote, and close to a thousand opinions that you were a part of, if not the author, and the twenty speeches delivered by you.

These hearings will extend that review, and should provide a rich body of information that will answer the question: Who is Anthony Kennedy and what does he stand for, and how does he, how does he view the Constitution and its role in our society?

The Bork hearings set high standards for this committee, the Senate, and the President, in the appointment of a Supreme Court Justice.

From those hearings have emerged lasting principles for the nomination and confirmation of members of the Supreme Court. First, the President exercises better judgment when he considers the prevailing views of the Senate, and the American people before making a nomination. This has always been the case for 200 years.

Second, if the President does consider the views of the Senate and the people in making the nomination, the Senate may not need to act as such a forceful constitutional counterweight.

Thus, the Senate must carefully judge whether the President has nominated someone who is simply philosophically compatible with him, or someone who would bring a political agenda to the Supreme Court. And third, we, in the Senate, still have a constitutional duty to make our review a thorough one.

That means we must know the nominee's constitutional views, and state clearly to the nominee our own perspective on constitutional interpretation. To uphold these standards, we must begin by insisting that every Supreme Court nominee understand and accept a number of basic constitutional principles, among them the separation of powers, unenumerated rights, equal protection for

minorities and for women, for all citizens, and due process of the law, and the precious rights protected by the first amendment.

It seems to me the Senate should, properly, explore further each of these issues, and it is equally reasonable to expect every nominee to state to the Senate the general—I emphasize general—criteria that he, or she, would use to apply these fundamental principles.

Without the criteria to apply them, fundamental principles may shrink to the status of noble but empty rhetoric. Therefore, in these hearings, Judge Kennedy, I intend to ask you questions in the following five areas.

I will ask you questions intended to determine whether your view of the Constitution has a narrow code of enumerated rights. To me, the idea of unenumerated rights expresses a larger truth, a truth which I believe the President alluded to when he introduced you.

The American people have certain rights, not because the government gives them those rights, or because the Constitution specifically names them, but because we exist, simply exist as children of God. That our rights can expand with America's proud and evolving heritage of liberty, a heritage founded in the Constitution, that is, in the words of Justice Harlan, quote, "A living thing."

I will ask you questions about the nature of what you have called the "unwritten Constitution," which restrains the exercise of power among all branches of government, and about how the doctrine of precedent restrains the exercise of power by the Supreme Court in particular.

I will ask you questions about your views on civil rights and gender discrimination, and your understanding of the role of Congress, and the courts, in providing remedies for past acknowledged discrimination.

I will ask you questions on the constitutional balance that should be struck between the procedural protections guaranteed to those accused of criminal acts, and the consideration that should be given to the safety of society and the victims of crime.

In discussing these areas, I—and I expect most of my colleagues—will not ask you to predict what your vote will be, or to say how you would decide a specific case in the future. I want instead, to understand the approach you will use, the general criteria you will bring to constitutional claims on these issues, a discussion that is critical, if the committee is to perform its constitutional role properly.

It is somewhat presumptuous of me, Judge, but I suggest that you might adopt the role of professor, rather than judge, in answering those questions.

Discuss with us how you arrive at your views on the Constitution. Educate us a little bit as to who Tony Kennedy is. Some outside this committee misunderstood this very vital distinction during our last hearing.

Indeed, there are reports that the administration, and even some of my colleagues, have not observed the distinction, either. In my view, these reports are a matter of grave concern.

So finally, I will also ask you whether the administration, or any member of this body, have sought any commitments from you on

matters that might come before the Supreme Court. For just as it is, in my view, inappropriate for us to seek those commitments, it would be highly inappropriate for anyone else, in determining whether or not you are appointed, or whether or not they will vote for you, to seek similar commitments.

In September, both my conservative and liberal colleagues, as well as the previous nominee, were emphatic, that no campaign promises were sought or secured in the judge's testimony before this committee. None will be sought or secured at this hearing either.

I expect, however, that within reasonable limits of propriety, you will respect the Senate's constitutional role of advice and consent, by being as forthcoming and responsive as possible. As I am sure you remember from our conversations in private, Judge, the committee fully expects a thorough discussion of your constitutional philosophy, because while your judicial record is impressive, it does not address many constitutional issues.

And though your speeches are stimulating, they raise, in many cases, as many questions as they answer, and, consequently, Judge, the committee would very much appreciate—and quite frankly we expect—forthcoming answers that will shed light on your constitutional philosophy.

I expect this to move very swiftly, and fairly, and I hope—and I mean this sincerely—I hope you enjoy the experience. This is not anything other than an attempt to have a dialogue with you as to who you are, what you stand for, why you want to be on the Court, so we have a sense of what we are about to vote on.

Most everyone on this committee look—I think everyone on this committee looks very favorably on your nomination, but most of us have an open mind. As one of my colleagues said this morning, the most important witness in this hearing will be Judge Kennedy, and Judge, we welcome you, we look forward to hearing from you, and with that, let me yield to my colleague from South Carolina for his opening statement.

[The statement of Senator Biden follows:]

OPENING STATEMENT
SENATOR JOSEPH R. BIDEN, JR.
SENATE JUDICIARY COMMITTEE HEARING
ON THE NOMINATION OF ANTHONY KENNEDY
TO BE AN ASSOCIATE JUSTICE
OF THE SUPREME COURT

MONDAY, DECEMBER 14, 1987

This committee last assembled to consider a Supreme Court nomination on the eve of the 200th anniversary of the Constitution's drafting. Our debate with Judge Bork and the other witnesses was vigorous, educational, and ultimately enlightening. In sum, it was a debate that I and most other Senators believe was worthy of that momentous anniversary.

Today, there's a calmer atmosphere. The confrontational spirit that characterized the last two nominations has passed as well.

But make no mistake about it. At this moment in history, the Senate's decision on this nomination is every bit as important as our decision on the nomination of Judge Bork. For if you are confirmed, Judge Kennedy, you will occupy the same position of power and responsibility to which Judge Bork and Judge Ginsburg were nominated. Our tradition of evolving liberty is just as much at stake today as it was when Justice Powell resigned in July.

So, once again, we meet to discuss the meaning of the majestic phrases of our greatest document, the Constitution -- phrases that Justice Harlan knew cannot be "reduced to any formula;" a document that as Chief Justice Marshall foresaw, was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

Through that document, the Supreme Court holds far-reaching power over the constitutional rights and the daily lives of every American citizen. Accordingly, our role of advice and consent demands from every Senator a thorough and careful review, even with nominees of sterling character and qualifications.

This careful review is not an expression of doubt about a nominee, but a recognition of our obligation under the Constitution.

In the past, I and many other Senators of both parties have been frustrated with the confirmation process for some other Supreme Court nominees. The Senate was being asked, in effect, to

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waive through nominees to the highest tribunal in America -- largely on faith. Surely, the Framers did not intend this institution to bestow such monumental powers after such a cursory examination.

In contrast, when we considered the Bork nomination, every one of us carefully reviewed the nominee's full record of constitutional and judicial thinking -- and the heart of that review took place during the committee's hearings. Each Senator on the committee reached his own conclusion about what views are or are not acceptable for a Supreme Court Justice to hold.

That review process begins again with this nomination. We have spent the past month reviewing the 438 opinions written by you and the 20 speeches delivered by you. These hearings will extend that review, and should provide a rich body of information that will answer the question -- Who is Anthony Kennedy and what does he stand for?

The Bork hearings set high standards for this committee, the Senate and the President in the appointment of a Supreme Court Justice. From those hearings have emerged lasting principles for the nomination and confirmation of members of the Supreme Court.

First, the President exercises better judgment when he considers the prevailing views of the Senate and the American people before making a Supreme Court nomination.

Second, when the President does consider the views of the Senate and the people in making the nomination, the Senate may not need to act as such a forceful constitutional counterweight. Thus, the Senate must carefully judge whether the President has nominated someone who is simply philosophically compatible with him, or someone who would bring a political agenda to the Court.

Third, we in the Senate still have a constitutional duty to make our review a thorough one. That means we must know the nominee's constitutional views, and state clearly to the nominee our own perspectives on constitutional interpretation.

To uphold these standards, we must begin by insisting that every Supreme Court nominee understand and accept a number of basic constitutional principles. Among them: the separation of powers; unenumerated rights; equal protection for minorities, for women, for all citizens; due process of law; and the precious rights protected by the First Amendment.

The Senate should properly explore these issues further.

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And it is equally reasonable to expect every nominee to state to the Senate the general criteria that he or she would use to apply those fundamental principles. For without the criteria to apply them, fundamental principles may shrink to the status of noble but empty rhetoric.

Therefore, in these hearings, Judge Kennedy, I intend to ask you questions in the following five areas:

I will ask you questions intended to determine whether you view the Constitution as a narrow code of **enumerated** rights. To me, the idea of unenumerated rights expresses a larger truth: a truth to which I believe the President alluded when he introduced you -- that Americans have certain rights not because the government gives them or because the Constitution specifically names them, but because we exist, as children of God; that our rights can expand with America's proud and evolving heritage of liberty, a heritage founded on a Constitution that is, in the words of Justice Harlan, a "living thing."

I will ask you questions about the nature of what you have called our "unwritten constitution," which restrains the exercise of power among all branches of government, and about how the doctrine of precedent restrains the exercise of power by the Supreme Court in particular.

I will ask you questions about your sensitivity to matters of civil rights and gender discrimination, and your understanding of the role of Congress and the courts in providing remedies for past discrimination.

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In discussing these areas, I will not ask you to predict your vote or to say how you would decide any specific future case. I want instead to understand the approach you would use and the general criteria you would bring to constitutional claims on these issues -- a discussion that is critical if this committee is to perform its constitutional role properly.

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observed that distinction either. In my view, those reports are a matter for grave concern.

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In September, both my conservative and liberal colleagues, as well as Judge Bork, were emphatic that no "campaign promises" were sought or secured in the Judge's testimony before this Committee. None will be sought or secured in these hearings.

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Consequently, Judge, the Committee would appreciate forthcoming answers that shed light on your constitutional philosophy.

Welcome Judge. I look forward to hearing from you.

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Senator THURMOND. Mr. Chairman, today the committee begins consideration of the nomination of Judge Anthony M. Kennedy to be an Associate Justice of the U.S. Supreme Court.

As we begin the hearing process, we must remain keenly aware that a Supreme Court appointment is unique, not only because it grants life tenure, but more specifically, because it invests great power in individuals not held accountable by a popular election.

Along with this power comes a greater responsibility to the people of this nation, to the concept of justice, and to the Constitution. Judge Kennedy, it is very fitting that the Senate consider your nomination to be an Associate Justice of the Supreme Court at a time when we are celebrating the 200th anniversary of the Constitution of the United States.

It is also fitting that we take a moment to reflect not only on the wisdom of our forefathers in preparing this magnificent document, but also on the tremendous responsibility it confers on the Senate. The Constitution assigns the Senate and the House equal responsibility for declaring war, maintaining an armed forces, assessing taxes, borrowing money, minting currency, regulating commerce, and making all laws necessary for the operation of the Government.

However, the Senate alone holds exclusive authority to advise and consent on nominations, and this, without doubt, is one of the most important responsibilities undertaken by this body.

It is one that takes on an even greater significance when a nomination is made to the highest court in the land. The Senate has assigned the task of reviewing judicial nominations to the Judiciary Committee.

This responsibility is critical to the nomination process. The committee's consideration must be equitable, thorough, and diligent. The Judiciary Committee must be ever so mindful that a nomination to the Supreme Court affects all the people of this nation, and not just a select group.

The role of the Supreme Court in America's development has been vital because the Court has faced many difficult issues. Using its collective intellectual capacity, precedent, and constitutional interpretation, the Court must address issues related to criminal law, abortion, privacy, church-state relations, freedom of speech, freedom of the press, the death penalty, civil rights, and much, much more.

Throughout the course of this nation's history, the Court has been thrust into the center of many difficult controversies.

As Justice Holmes stated, "We are quiet here, but it is the quiet of a storm's center."

Due to the broad range of controversial issues which must be resolved by the Court, and the impact these decisions will have, great responsibility is placed upon each Justice, and an Associate Justice must be an individual who possesses outstanding qualifications.

In the past, I have reflected upon these qualifications, and I will only briefly reiterate that I feel a nominee should possess integrity, courage, wisdom, professional competence, and compassion.

An individual with these attributes cannot fail the cause of justice. In his 12 years of service on the U.S. Court of Appeals for the Ninth Circuit, Judge Kennedy has displayed these qualities.

His proud judicial service, and his distinguished background make him eminently well-qualified to serve on the nation's highest Court.

He attended Stanford University from 1954 to 1957, and was awarded the degree of bachelor of arts, with great distinction, in 1958.

During the year 1957 to 1958, after he had already fulfilled the principal requirements for graduation from Stanford, he attended the London School of Economics and Political Science at the University of London, where he studied political science and English legal history, and also lectured in American Government.

He graduated cum laude from Harvard Law School in 1961. Judge Kennedy practiced law for several years before his appointment to the ninth circuit, where he now ranks among the most senior judges on the bench.

He has vast judicial experience, participating in over 1400 decisions, and authoring over 400 published opinions. In addition, Judge Kennedy has been a constitutional law professor at the McGeorge School of Law at the University of the Pacific for more than 20 years.

A review of Judge Kennedy's 400 written opinions indicates that he is among the leaders of thoughtful jurisprudence. Judge Kennedy's published opinions have earned him the reputation reserved for our most distinguished jurists.

His opinions clearly show that he is an advocate of judicial restraint. Judge Kennedy has already had a major impact on American jurisprudence. In 1980 he ruled against the so-called legislative veto, a once common practice under which Congress would grant certain authority to the executive branch, would reserve to itself the right to disapprove particular sections exercised under that authority.

Judge Kennedy declared that the practice violated the constitutional separation of powers. The Supreme Court adopted Judge Kennedy's position.

In a 1983 dissent, in the case of *U.S.* v. *Leon*, Judge Kennedy argued that a court should admit evidence seized by law-enforcement officers under a search warrant, that they believed to be proper. The Supreme Court ultimately reversed a majority opinion, and adopted a good-faith exception to the exclusionary rule.

Generally, the opinions written by Judge Kennedy take a law-and-order position. However, Judge Kennedy has made it clear that if law-enforcement officers overstep legal bounds, he will not hesitate to limit overreaching.

While the constitutional rights of criminal defendants must be protected, Judge Kennedy will not ignore the rights of victims or law-abiding citizens.

I am confident that he will take a practical, common-sense approach to criminal cases, protecting the constitutional rights of criminal defendants, but upholding the right of society to be protected from those who commit criminal wrongdoings.

A review of other opinions written by Judge Kennedy shows that he examines viewpoints and arguments from all sides. His opinions show that he is openminded, fair, and independent. He does not,

before he has the facts, in reviewing the appropriate law, develop preconceived ideas about what the ultimate result should be.

I will also note that Judge Kennedy's opinions show compassion, and why Judge Kennedy has upheld tough sentences. He has shown the fortitude to reverse a criminal conviction if an individual has been treated fundamentally unfair, or his constitutional rights have been violated.

In summary, a complete and thorough review of Judge Kennedy's background indicates that he is competent, fair, and just, and furthermore, that he is exceptionally well-qualified to serve as an Associate Justice of the Supreme Court.

His vast experience as a practicing attorney, professor of constitutional law, and many years of service on the federal bench provide the ideal background and qualifications for confirmation to the nation's highest Court.

Judge Kennedy, we welcome you to the committee, along with your wife Mary, and the rest of your family, and congratulate you on the honor that President Reagan has bestowed upon you.

[The statement of Senator Thurmond follows:]

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SENATE COMMITTEE ON THE JUDICIARY. REFERENCE NOMINATION OF JUDGE ANTHONY M. KENNEDY TO BE ASSOCIATE JUSTICE OF THE UNITED STATES, MONDAY, DECEMBER 14, 1987, 10:00 A.M.

MR. CHAIRMAN:

Today the Committee begins consideration of the nomination of Judge Anthony M. Kennedy to be an Associate Justice of the United States Supreme Court. As we begin the hearing process, we must remain keenly aware that a Supreme Court appointment is unique, not only because it grants life tenure but, more specifically, because it vests great power in individuals not held accountable by popular election. Along with this power, comes a greater responsibility to the people of this Nation, to the concept of Justice, and to the Constitution.

Judge Kennedy, it is very fitting that the Senate consider your nomination to be an Associate Justice of the Supreme Court at the time we are celebrating the two hundredth anniversary of the Constitution of the United States.

It is also fitting that we take a moment to reflect not only on the wisdom of our forefathers in preparing this magnificent document, but also on the tremendous responsibility it confers on the Senate. The Constitution assigns the Senate and the House equal responsibility for declaring war, maintaining the armed forces, assessing taxes, borrowing money, minting currency, regulating commerce, and making all laws necessary for the operation of the government. However, the Senate <u>alone</u> holds exclusive authority to advise and

consent on nominations, and this, without doubt, is one of the most important responsibilities undertaken by this body. It is one that takes on an even greater significance when a nomination is made to the highest Court in the land. The Senate has assigned the task of reviewing nominations to the Judiciary Committee. This responsibility is critical to the nomination process. The Committee's consideration must be equitable, thorough, and diligent. The Judiciary Committee must be ever so mindful that a nomination to the Supreme Court affects all the people of this nation and not just a select group.

The role of the Supreme Court in America's development has been vital because the Court has faced many difficult issues. Using its collective intellectual capacity, precedent, and Constitutional interpretation, the Court must address issues related to criminal law, abortion, privacy, church-state relations, freedom of speech, freedom of the press, the death penalty, civil rights, and much, much more. Throughout the course of this Nation's history, the Court has been thrust into the center of many difficult controversies. As Justice Holmes stated: "We are quiet here, but it is the quiet of a storm center."

Due to the broad range of controversial issues which must be resolved by the Court and the impact these decisions will have, great responsibility is placed upon each Justice. An Associate Justice must be an individual who possesses outstanding qualifications. In the past, I have

reflected upon these qualifications and I will only briefly reit erate, that I feel a nominee should possess: Integrity, Courage, Wisdom and Compassion. An individual with these attributes cannot fail the cause of Justice.

In his twelve years of service on the U.S. Court of Appeals for the Ninth Circuit, Judge Kennedy has displayed these qualities. His prior judicial service and his distinguished background make him eminently well-qualified to serve on this Nation's highest court. He attended Stanford University from 1954 to 1957 and was awarded the Degree of Bachelor of Arts with great distinction in 1958. During the year 1957-1958, after he had already fulfilled the principal requirements for graduation from Stanford, he attended the London School of Economics and Political Science at the University of London where he studied political science and English legal history, and also lectured in American Government. He graduated cum laude, from Harvard Law School in 1961. Judge Kennedy practiced law for several years before his appointment to the Ninth Circuit where he now ranks among the most senior judges on the bench. He has vast judicial experience, participating in over fourteen hundred decisions and authoring over four hundred published opinions. In addition, Judge Kennedy has been a constitutional law professor at the McGeorge School of Law at the University of the Pacific for more than 20 years.

A review of Judge Kennedy's 400 written opinions indicates that he is among the leaders of thoughtful jurisprudence.

Judge Kennedy's published opinions have earned him the reputation reserved for our most distinguished jurists. His opinions clearly show that he is an advocate of judicial restraint.

Judge Kennedy has already had a major impact on American jurisprudence. In 1980, he ruled against the so-called legislative veto, a once common practice under which Congress would grant certain authority to the Executive Branch but reserve to itself the right to disapprove particular ~~actions~~ sections exercised under that authority. Judge Kennedy declared that the practice violated the constitutional separation of powers. The Supreme Court adopted Judge Kennedy's position.

In a 1983 dissent in the case of U.S. v. Leon, Judge Kennedy argued that a court should admit evidence seized by law enforcement officers under a search warrant that they believed to be proper. The Supreme Court ultimately reversed the majority opinion and adopted a "good faith" exception to the exclusionary rule.

Generally, the opinions written by Judge Kennedy take a law-and-order position. However, Judge Kennedy has made it clear that should law enforcement officers overstep legal bounds, he will not hesitate to limit overreaching. While the constitutional rights of criminal defendants must be protected, Judge Kennedy will not ignore the rights of victims or law-abiding citizens. I am confident that he will take a

practical, common sense approach to criminal cases, protecting the constitutional rights of criminal defendants, but upholding the right of society to be protected from those who commit criminal wrongdoings.

A review of other opinions written by Judge Kennedy shows that he examines viewpoints and arguments from all sides. His opinions show that he is open-minded, fair and independent. He does not, before hearing the facts and reviewing the appropriate law, develop preconceived ideas about what the ultimate results should be. I also note that Judge Kennedy's opinions show compassion. While Judge Kennedy has upheld tough sentences, he has shown the fortitude to reverse a criminal conviction if an individual has been treated fundamentally unfair or his constitutional rights have been violated.

In summary, a complete and thorough review of Judge Kennedy's background, indicates that he is competent, fair, and just, and furthermore that he is is exceptionally well qualified to serve as an Associate Justice of the Supreme Court. His vast experience as a practicing attorney, professor of constitutional law, and many years of service on the Federal bench provide the ideal background and qualifications for confirmation to the Nation's highest court.

Judge Kennedy, we welcome you to the Committee, along with your wife Mary and the rest of your family, and congratulate you on the honor President Reagan has bestowed upon you.

-End-

The CHAIRMAN. Thank you very much, Senator. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman. I also want to join in welcoming Judge Kennedy and his family to these hearings. It is always nice to see a Kennedy nominated for high public office.

The vacancy on the Supreme Court is no less important today than it was 6 months ago when Justice Powell resigned. His departure left a large opening, and the person who fills it will have a large role in defining the scope of the fundamental rights and liberties of the American people for years to come.

The events since Justice Powell's resignation have provided a clear demonstration of what the American people expect of a nominee to the nation's highest court.

They want a Justice who understands that the Constitution is not just a parchment frozen under glass in 1787. It is the living, growing embodiment of our history, traditions, and aspirations as a free people.

They want a Justice who appreciates that the Supreme Court is not just a tribunal for the intellectual resolution of lawsuits. It is the institution that protects our constitutional rights and liberties from the prejudices of the moment, and from excessive intrusions by the Government.

And they want a Justice who will not be a mouthpiece of the ideology of a single constituency or group. They want a Justice for all.

In reviewing Judge Kennedy's opinions and speeches, I have seen some hopeful signs, and some troubling ones.

I am impressed by one of his opinions recognizing that the Constitution prevents law-enforcement officers from bribing a 5-year-old child to be an informant against his mother.

I am impressed by another opinion vigorously applying the first amendment to protect controversial speech in political debate.

And he deserves credit for his landmark opinion in the *Chadha* case, in which he correctly anticipated the Supreme Court's resolution of the complex issues of separation of powers between Congress and the President with respect to the legislative veto.

But I am troubled by the narrow interpretation that Judge Kennedy has given civil rights in a number of cases. In some of these cases, his interpretations were flatly rejected by the Supreme Court. And I am also concerned by his past membership in clubs that discriminated against minorities and women.

These hearings will help us to determine whether Judge Kennedy is sensitive to the constitutional rights of the American people, and if he is, he will deserve to be confirmed by the Senate. Thank you.

[The statement of Senator Kennedy follows:]

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY
Hearings on the Nomination of Judge Anthony M. Kennedy
to the Supreme Court

Senate Judiciary Committee
December 14, 1987

I join in welcoming Judge Kennedy and his family here today. It's always nice to see a Kennedy nominated to high public office.

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-- They want a Justice who appreciates that the Supreme Court is not just a tribunal for the intellectual resolution of lawsuits; it is the institution that protects our constitutional rights and liberties from the prejudices of the moment and from excessive intrusions by the government.

-- And they want a justice who will not be a mouthpiece for the ideology of a single constituency or group; they want a Justice for all.

In reviewing Judge Kennedy's opinions and speeches, I have seen some hopeful signs -- and some troubling ones.

I am impressed by one of his opinions recognizing that the Constitution prevents law enforcement officers from bribing a five year-old child to be an informant against his mother. I am impressed by another opinion vigorously applying the First Amendment to protect controversial speech in political debate. And he deserves credit for his landmark opinion in the Chadha case, in which he correctly anticipated the Supreme Court's resolution of the complex issue of separation of powers between Congress and the President with respect to the legislative veto.

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These hearings will help us to determine whether Judge Kennedy is sensitive to the constitutional rights of the American people. If he is, he will deserve to be confirmed by the Senate.

The CHAIRMAN. Thank you, Senator.

My colleague from Utah, Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. Again, like the others, I am happy to welcome you, Judge Kennedy, and your family to these hearings.

I have been very impressed with you as we have met for extensive periods of time, and as we have chatted, and I just want to tell you it is nice to see this day arrive.

It is indeed an honor to welcome you, an individual, who I think is eminently qualified to serve in the nation's premier judicial office.

You have the highest qualifications given you by the American Bar Association. Unanimously. I think that is a great thing after what I saw Judge Bork go through, and I want to give some credit to the Washington Post for the good editorials that they have written with regard to the rating system of the ABA, recognizing its importance, but also recognizing that there is an obligation there, too.

And I think that they have lived up to their obligations with regard to you, and I am very pleased about that.

You have had 14 years experience as a practicing attorney, 20 years as a professor of constitutional law, and more than 12 years on the circuit court that defines federal law for nine States and 37 million people. I think this has prepared you for the trust that we are about to place in you, and the trust displayed in you by President Ronald Reagan.

Indeed, as this hearing progresses, I think President Reagan's trust will soon be shared by the people of the United States.

As we all know, it would be difficult to find an aspect of American life that has not been touched by the Supreme Court. I might say, in approximately the time that you have served on the ninth circuit, a President has resigned, the world's largest telecommunications company has disintegrated, or at least has been changed, rules for criminal trials have changed, and even a town's ability to display a creche during the holiday season has been established, all because nine individuals in our society have found enduring principles in the Constitution itself.

But as we well know, it has recently become an issue whether the Supreme Court must find the principles for its decisions in the Constitution.

Some legal scholars and even some judges have contended that judges need not base their decisions on the words of the Constitution. Instead, they contend that judges may go outside the Constitution to decide cases on the basis of the judges' understanding of human dignity, or some other vague and unlimited principle.

The problem with this argument is that it permits unelected judges to override democratic laws created by the people themselves without constitutional justification.

For example, judges have overturned capital punishment laws in 34 States—even though the Constitution itself, in four or five instances, mentions the death penalty—and this is known generally as judicial activism.

In my mind, judges who take upon themselves to overrule the people's laws without clear warrant from the Constitution, overstep

their authority. Of course, all judges are not so bold. Most judges do practice judicial restraint, which is another way of saying they refrain from using extra-constitutional principles to decide cases.

The reason for judicial restraint is I think well-illustrated in a statement by a distinguished jurist:

> The imperatives of judicial restraint spring from the Constitution itself, not from a particular judicial theory. The Constitution was written with care and deliberation, not by accident. Its draftsmen were men skilled in the art and science of constitution writing. The constitutional text, and its immediate implications, traceable by some historical link to the ideas of the Framers, must govern judges.
>
> *Marbury* v. *Madison* states the rule: "It is apparent that the Framers of the Constitution contemplated that instrument as a rule for the government of the courts, as well as the legislature."

Now this eminent jurist with profound respect for the Constitution is none other than Judge Anthony Kennedy in an address to the Canadian Institute for Advanced Legal Studies, more than a year ago.

To those who classify judges who practice judicial restraint as conservative, Judge Kennedy I think has the best response. As he stated, judicial restraint is neither conservative or liberal, but a requirement of the Constitution and a natural predicate for the doctrine of judicial review.

Now Judge Kennedy is a champion of judicial restraint. It is easy to understand why he has won President Reagan's trust, and it is easy to understand why he will win the trust of the American people as well.

After all, he will let the American people govern themselves, and refrain from imposing his own predispositions from the bench. If the people legislate a death penalty, for example, I think he will apply it because the Constitution is clearly no bar.

In that regard, Judge, I just want to make a recommendation to you. There are a lot of comments about how you will have to go into philosophy here, and you are going to have to go into judicial theories, and concepts, and that you can treat them any way you want to.

Let me just say this: I think we, as a committee, have to refrain from delving into your personal views with regard to constitutional doctrine.

First of all, I think it is unfair to future litigants before the Supreme Court. So, if you do want to answer some of these questions, choose with care how you do it because you may have that case before the Supreme Court at some future time, and you do not want to prejudice your right to decide that case, or have them criticize you after the fact, which certainly will occur.

The very ones who raise it here will be the most critical if you do not agree with them in the future. I think future litigants need to know that Judge Kennedy is open to their arguments, not predisposed against them. That he is going to be open to whatever the arguments and facts of the case really are.

And I think you have to show that you will not be prejudiced for or against any doctrines, and that is a very delicate, difficult line to traverse. So I want to just recommend to you, don't be bullied or badgered into thinking you have got to answer every question that we ask up here.

Some of them you simply cannot answer, and some of them you will simply have to say, this is a matter that is presently in the courts of this land or may come before the Supreme Court, and I have to be concerned about whether or not I prejudice my right to sit on that particular case in the future, and besides, I do not know what the facts are going to be in future cases that come before the Court.

So, there are limitations to what even you distinguished Senators can ask in your very time-honored and constitutional function of investigating for purposes of confirming, or not confirming, and your function of advising and consenting.

I do not think you can offer an informed view of doctrines until they really appear in the form of a case. Before a judge can make a determination on the merits of certain doctrines, I think he, or she, needs to read the briefs, hear oral argument, discuss the matter with colleagues, and see the issue in the context of the specific facts of that case.

And a judge should not presume to short-circuit this process with any prior opinions. Now that does not mean you cannot give your opinion, but certainly, you have to take that into consideration, and I think people here will respect such a decision.

The judiciary is an independent branch. Congress should not attempt to dictate the outcome of future cases, or even meddle in the processes of another branch, by extracting any kind of promises at any kind of confirmation hearing, least of all this confirmation hearing for one of the most important positions in our country's history.

So judges are independent. They are not subject to political pressure from Congress, and you do not have to be subject to it, either—I just want you to know that—in this very important set of hearings that we will have, where you will have an opportunity to really be a major participant.

I think it is totally unnecessary to delve into inquiries that you might have to have come before you at a future time. You have written over 430 opinions. You have participated in many, many more opinions, over a thousand opinions in addition to that, and I think this is an adequate body of evidence, and the best body of evidence, to ascertain how you will perform as a Supreme Court Justice.

So don't feel like you have to do something like that. By the way, I think it is good to see a Republican Kennedy in this environment. I just want you to know that, and I have noticed how well you have been treated by the press in this matter.

You know, some members of the press have treated you so fairly, that basically, they may have overlooked which branch of the Kennedy clan you come from, and I just want to tell you that I am glad to have you here.

And I also have deep respect for my colleague. We have been on as many as three committees together. So it is good to have you here.

I could say many more laudatory things about you. You are a wonderful family man from what I see. You have a profound determination to fight crime, and your opinions indicate that.

That is exactly what President Reagan said he would do, in trying to appoint people to the bench. And you want to fight it with appropriate legal tools. You have devoted much of your life to education and to teaching. These are very important things to me.

And I think the highest compliment a judge can receive, is that you know that ours is a government of laws, not of men, and that you have really been a stickler for abiding by the law, and I think that is important.

I think you deserve many more compliments than that. I think you have been a very appropriate model of judicial restraint on the bench, and I think that your service will serve to remind other judges of their duty to uphold the Constitution as written.

So these are important things, and I just want to compliment you for the efforts you have made in the past, for the reputation that you have gained, and of course for the good person that you are, and I hope that you will enjoy this appearance before the committee, and I know that you will enjoy your service on the Supreme Court in the future. Thank you.

[The statement of Senator Hatch follows:]

From the office of

SEN. ORRIN HATCH

Washington, D.C. 20510

December 14, 1987 Contact: Paul Smith, 202/224-9854

STATEMENT OF SENATOR ORRIN HATCH

THE NOMINATION OF JUDGE ANTHONY KENNEDY

Mr. Chairman. It is indeed an honor to welcome an individual who is eminently qualified to serve in the nation's premier judicial office. Fourteen years as a practicing attorney, twenty years as a professor of constitutional law, and more than twelve years on the circuit court that defines federal law for nine states and 37 million people have prepared Judge Anthony Kennedy well for the trust placed in him by President Ronald Reagan. Indeed as this hearing progresses, I think President Reagan's trust will soon be shared by the people of the United States.

As we all know, it would be difficult to find an aspect of American life that has not been touched by the Supreme Court. In approximately the time that Judge Kennedy has served on the Ninth Circuit, a President has resigned, the world's largest telecommunications company has disintegrated, rules for criminal trials have changed, and even a town's ability to display a creche during the holiday season have been established — all because nine individuals have found enduring principles in the Constitution.

But as we well know, it has recently become an issue whether the Supreme Court must find the principles for its decisions in the Constitution. Some legal scholars and even some judges have contended that judges need not base their decisions on the words of the Constitution. Instead they contend that judges may go outside the Constitution to decide cases on the basis of the judges' understanding of human dignity or some other vague and undefined principle. The problem with this argument is that it permits unelected judges to override the democratic laws created by the people without constitutional justification. For example, judges have overturned the capital punishment laws of 34 states even though the Constitution itself mentions the death penalty. This is known generally as judicial activism. In my mind, judges who take upon themselves to overrule the peoples' laws without clear warrant from the Constitution overstep their authority.

Of course, not all judges are so bold. Most judges practice judicial restraint, which is another way of saying they refrain from using extraconstitutional principles to decide cases. The reason for judicial restraint is stated well by one distinguished jurist: "The imperatives of judicial restraint spring from the Constitution itself, not from a particular judicial theory. The Constitution was written with care and deliberation, not by accident. Its draftsmen were men skilled in the art and science of constitution writing... The constitutional text and its immediate implications, traceable by some historical link to the ideas of the Framers, must govern judges. Marbury v. Madison states the rule: 'It is apparent that the Framers of the Constitution contemplated that instrument as a rule for the government of the courts, as well as the legislature.'" This eminent jurist with profound respect for the Constitution is none other than Judge Anthony Kennedy in an address to the Canadian Institute for Advanced Legal Studies more than a year ago.

To those who classify judges who practice judicial restraint as conservative, Judge Kennedy has the best response. As he stated, judicial restraint is neither conservative or liberal, but a requirement of the Constitution and a natural predicate for the doctrine of judicial review.

Judge Kennedy is a champion of judicial restraint. It is easy to understand why he has won President Reagan's trust. And it is easy to understand why he will win the trust of the American people as well. After all, he will let the people govern themselves and refrain from imposing his own predipositions from the bench. If the people legislate a death penalty, for example, he will apply it because the Constitution is clearly no bar.

I could say many more laudatory things about this excellent American — he is a wonderful family man, he has a profound determination to fight crime with appropriate legal tools, he has devoted much of his life to education and teaching, and so forth — but perhaps the highest compliment a judge can receive is that he knows ours is a government of laws, not of men. Judge Kennedy deserves that compliment and more. He is a model of appropriate judicial restraint and will serve to remind our other judges of their duty to uphold the Constitution as written.

I look forward, Judge Kennedy, to your appearance before this committee and your continued service to our nation.

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The CHAIRMAN. Thank you, Senator. The Senator from Ohio, Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

We begin these hearings almost 6 months after Justice Powell announced his retirement. I believe all of us on the committee are optimistic that the long struggle to fill this vacancy is nearing its conclusion. Nevertheless, this committee owes it to the Senate, and the American people, to conduct fair and thorough hearings, and I am confident we will do so.

I did not intend to address myself to this particular point, but my distinguished colleague from Utah I think was advising you not to answer some questions and to resist the temptation to explore with us some of the issues that we on the committee will inquire about.

I would hope that you would disregard that advice, and that you would follow your own judgment, which has been previously stated to many of us, and that is that the answers will be forthcoming.

I think, indeed, we have not only a right, but an obligation to inquire of your philosophy, and your approach, and your thinking. We do not have a right to ask of you how you will vote in connection with any particular case, or how you would have voted.

Judge, you are clearly qualified by ability and temperament to sit on the Supreme Court. In addition, the record suggests that you are a traditional conservative in your approach to constitutional and statutory interpretation.

I will be frank with you. I do not necessarily agree with all of your decisions. I would have been happier if you had reached different results in certain cases. I would have been pleased if you had resigned earlier from clubs that excluded women, though it is fair to point out that you did take affirmative steps, somewhat belatedly perhaps, to change the policy of those clubs.

In short, I am not going to say to you, Judge Kennedy, that you are my ideal nominee. But the choice is not ours in the Senate to make. On the basis of what we now know, you appear to be an acceptable nominee. Only after the hearing is concluded can we make that final assessment.

We have undergone a lengthy and exhausting struggle over who will become the next Supreme Court Justice.

The public is entitled to ask, "Has it really been worth this much trouble?" Without question, it has. We have had a national referendum on the kind of Constitution this country wants. The result has been an overwhelming endorsement for the one we have now.

The Senate and the American people rejected a nominee who believed individual freedoms can be found only in the fine print of the written Constitution. The Senate and the American people reaffirmed the value of broad constitutional protections for individual liberties, and strong guarantees of equal protection.

If this hearing demonstrates that you do indeed support these fundamental values—and I fully expect that it will—these months of struggle will pay rich dividends far into the future for our country.

Thank you, Mr. Chairman.

[The statement of Senator Metzenbaum follows:]

U.S. Senator Howard M.
METZENBAUM
of Ohio

Committees:
Judiciary
Labor and Human Resources
Energy and Natural Resources
Select Committee on Intelligence

Chairmanships:
Subcommittee on Antitrust
Subcommittee on Labor
Subcommittee on Energy
Regulation and Conservation

OPENING STATEMENT OF SENATOR HOWARD METZENBAUM
HEARING ON THE NOMINATION OF JUDGE ANTHONY KENNEDY
TO BE ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT
DECEMBER 14, 1987

WE BEGIN THESE HEARINGS ALMOST SIX MONTHS AFTER JUSTICE POWELL ANNOUNCED HIS RETIREMENT. I BELIEVE ALL OF US ON THE COMMITTEE ARE OPTIMISTIC THAT THE LONG STRUGGLE TO FILL THIS VACANCY IS NEARING ITS CONCLUSION. NEVERTHELESS, THIS COMMITTEE OWES IT TO THE SENATE AND THE AMERICAN PEOPLE TO CONDUCT FAIR AND THOROUGH HEARINGS AND I AM CONFIDENT WE WILL DO SO.

JUDGE KENNEDY IS CLEARLY QUALIFIED BY ABILITY AND TEMPERAMENT TO SIT ON THE SUPREME COURT. IN ADDITION, THE RECORD SUGGESTS THAT HE IS A TRADITIONAL CONSERVATIVE IN HIS APPROACH TO CONSTITUTIONAL AND STATUTORY INTERPRETATION.

ON THE OTHER HAND, I DO NOT NECESSARILY AGREE WITH ALL OF JUDGE KENNEDY'S DECISIONS. I WOULD HAVE BEEN HAPPIER IF HE HAD REACHED DIFFERENT RESULTS IN CERTAIN CASES. I WOULD HAVE BEEN

PLEASED IF HE HAD RESIGNED EARLIER FROM CLUBS THAT EXCLUDED WOMEN, THOUGH IT IS FAIR TO POINT OUT THAT HE TOOK AFFIRMATIVE STEPS TO CHANGE THE POLICY OF THESE CLUBS. IN SHORT, HE WOULD NOT BE MY IDEAL NOMINEE. BUT THE SIGNS ARE THAT HE IS AN ACCEPTABLE NOMINEE, AND THAT IS ALL WE ARE ENTITLED TO ASK OF THE PRESIDENT.

WE HAVE UNDERGONE A LENGTHY AND EXHAUSTING STRUGGLE OVER WHO WILL BECOME THE NEXT SUPREME COURT JUSTICE. THE PUBLIC IS ENTITLED TO ASK -- HAS IT REALLY BEEN WORTH THIS MUCH TROUBLE? WITHOUT QUESTION, IT HAS. WE HAVE HAD A NATIONAL REFERENDUM ON THE KIND OF CONSTITUTION THIS COUNTRY WANTS. THE RESULT HAS BEEN AN OVERWHELMING ENDORSEMENT FOR THE ONE WE HAVE NOW.

THE SENATE AND THE AMERICAN PEOPLE REJECTED A NOMINEE WHO BELIEVED INDIVIDUAL FREEDOMS CAN BE FOUND ONLY IN THE FINE PRINT OF THE WRITTEN CONSTITUTION. THE SENATE AND THE AMERICAN PEOPLE REAFFIRMED THE VALUE OF BROAD CONSTITUTIONAL PROTECTIONS FOR INDIVIDUAL LIBERTIES AND STRONG GUARANTEES OF EQUAL PROTECTION. IF THIS HEARING DEMONSTRATES THAT JUDGE KENNEDY DOES SUPPORT THESE FUNDAMENTAL VALUES -- AND I FULLY EXPECT THAT IT WILL -- THESE MONTHS OF STRUGGLE WILL PAY RICH DIVIDENDS FAR INTO THE FUTURE FOR OUR COUNTRY.

The CHAIRMAN. Thank you very much, Senator. Senator Simpson from Wyoming.

Senator SIMPSON. Thank you, Mr. Chairman. I appreciate your very steady and sure handling of this nomination, for indeed, we must be about our business.

It is a rich pleasure to have you here today, Judge Kennedy. I trust you are looking forward to these hearings. I mean that. I think the Chairman is correct.

Here is where we have the opportunity to publicly interrogate you with respect to issues of great importance. While that word, interrogation, sometimes, perhaps often, has some rather negative connotations, I am very certain that our Chairman will maintain proper order and decorum in this process, and assure that you are treated with all of the respect due to your high office and to your nomination.

But before I go further, I need to clarify something which I said during the Bork nomination, which has proven to be in total error. A little bit, really, off the rail.

And so I will eat crow—legs, beak and all here—because on occasion, I expressed my opinion during some of the wretched excesses of the Bork hearing—and there were some—that if Judge Bork were not to be confirmed, then the next nominee would be some nameless, faceless, witless, and terminally bland soul who I referred to as Jerome P. Sturdley.

Now, I said that, and suffered a foot-in-the-mouth disease, because I was wrong, so very wrong. You are living proof of my error, because, indeed, you are a splendid and remarkable new nominee, and your record of public service and professional life is absolutely outstanding.

I will not go into your background. Senator Biden has covered that, and Senator Thurmond. But it is extraordinary, beginning at the age of 38 on the bench, Stanford, graduation cum laude, Phi Beta Kappa, London School of Economics, election to the Harvard Law School board of student supervisors, your private practice, your pro bono efforts.

That distances you about as far away from my mythical character as one could possible get. So we are going to review your record, and we have reviewed this for some time now. The committee has reviewed it. Others are very interested.

Specifically, now, we know of the unanimous recommendation of the American bar in providing you with the highest possible rating, that of well-qualified.

I will leave for another time a discussion of how the ABA came to its decision, but they eventually got it right. It is important to note that. They were certainly disappointing doing the last nomination. Four of their remarkable crew are still cloaked somewhere in anonymity. We do our business in the light here.

It is important to note, from the outset, that you received the nomination you so clearly deserve. Well, Senators give you advice on how to answer questions. I heard that. But if you want to choose a course, why, try the one that the last three successful nominees picked. Those questions of the committee were answered like:

How I am to resolve a particular issue, or what I might do might make it necessary for me to disqualify myself, and that would result in my inability to do my

sworn duty. I do not think I should, Senator, respond to the question, because that may well be an issue argued before the Court, and I do not want to be in a position of having a connection, as a condition of my confirmation.

As any nominee will in the future, and have always in the past, say, "I just cannot do it." Now those were the remarks of Justices O'Connor, Rehnquist and Scalia. You would want to follow that good counsel there, I think somewhat, anyway.

It is well worth pursuing. I think it is very important to remember that that worked, and Judge Bork of course got into the full panoply of effort because he had no choice. He had no choice. You do. You have not been hammered flat before you got here.

So, as we proceed here, we will want to know about your judicial philosophy. I am certain there are those who would believe it to be too conservative to the extent that that label, conservative or liberal, really means much. It never has in my life, to add a bit of dimension or light to a situation—but that is not the inquiry.

The inquiry is whether you possess the integrity, temperament, and ability to be on the Supreme Court. The inquiry is also whether your judicial philosophy, without consideration of your political philosophy, is worthy of representative on the Supreme Court, and I very much believe it is.

I hope that we will do that fairly. I have disagreed with the specific judicial philosophy which nominees possess—and I have done this before, so this is not a case, you know, of sudden enlightenment. And again, I bring to the floor the case of Judge Pat Wald, who serves absolutely superbly, and was being criticized for the most superb and banal activities I have ever heard of. And she's there on the bench. She's doing a marvelous job, and I supported her.

And I've supported other nominees of Jimmy Carter, so that's the way that is. I just hope that when I'm in the minority, and a president is presenting a nominee, that I will be as fair as I hope others would be.

It's called fairness. I know that is naive, but I still like to try that. And it would be eminently defeating to our national goals if we ever have another situation—it doesn't matter who it is—similar to Robert Bork's process.

Additionally, even though you hold these particular philosophies, we also know there is no predictability as to how you'll act when you get on the high court bench.

That has proved to be troublesome to some in the past. And it is so important for all of us to remember that you will be only one of nine. To form a majority, you would have to be joined by at least four of your colleagues, just as you were joined when you wrote your majority opinions on the ninth circuit.

It seems to me around here we focus on the nominees as single entities, as though they're the sole arbiters of justice, discounting the importance and impact of the other eight justices on the Court.

That dazzled me in the last exercise. Because Bork, to carry out his "heinous" agenda, was evidently this Pied Piper who would lead four dull witted colleagues off the edge of the pier. That's what he would have had to have done. How deceptive that was.

So I look forward to the hearings, working with you. I enjoyed our visit. I found your treatment of the Bork nomination, Mr.

Chairman, to be under all the circumstances equitable. I say that to you, Mr. Chairman. You always command my utmost personal regard and appreciation, just as under the chairmanship of Ted Kennedy and Strom Thurmond in this committee, we brought forth an appreciation for your efforts, your honest attempts.

And I commend you, Mr. Chairman, as to how you personally handled that at a time of great personal distress to you. So I know it will be fairly done.

And I said under the first procedures at the inception of the Bork nomination that his confirmation or rejection would be brought about by use of a deft blend of emotion, fear, guilt and racism.

Yes, I overuse that phrase, I do. But it proved to be so. My prediction was borne out.

I know that we will be avoiding all that kind of stuff in this nomination. And we seem to be off to a much better start.

Of course, let me conclude, we remember again that you were unanimously confirmed by this Senate previously. And since that time you have served with great honor and distinction.

I'm sure that your current and former students at McGeorge Law School will be watching intently to see just how you answer these questions on constitutional law.

They will think, "I remember he fired those questions at me. How will he do?" It will be the law students' primal joy to watch you in these proceedings. No doubt you will handle yourself with great aptitude and dignity.

I look forward to hearing your views, indeed I do. And I say, as I have said always, that there are not many of us here, at this table, who would like to be at that table where you sit in your position. We could not pass the test that we now give to you and to others. In no way, none of us.

And as I have said before, I would hate to have someone rifling through the collected utterances, mumblings and scratchings of Al Simpson. It would be a bizarre array of stuff.

But once again, America will be watching to see how we do our business of advice and consent. The Senate obviously has no objective criteria.

I think we learned much from the past one. We have no standards, no criteria by which to honestly measure the qualifications of Supreme Court nominees.

Each Senator simply makes up his or her mind. And they make up their own criteria, which is even more fascinating. And often, sometimes, even before the hearings, which is ever sublimely fascinating.

And then they come to their conclusions.

I know you're going to handle things beautifully. You will be a splendid addition to the Supreme Court.

I intend to participate fully, Mr. Chairman, and I await your presentation with great interest and anticipation.

Welcome to you, sir, and to your fine family. And I thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. I say to my colleague, I thank him for his kind remarks about me.

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And Judge, just like none of us would like to be where you are right now, we probably would find a majority up here would like to be on the Court.

And just as you would probably not like to stand for election, you probably would not be offended to be appointed to the United States Senate.

So we all go through similar proceedings, we in a general election, and you before us.

And lastly, it is true, you are only one of nine. But I think a case that's just been handed down a few minutes ago by the Supreme Court on one of the most controversial issue in America today that tied four to four indicates why your nomination is so critical.

I yield to my colleague from Arizona.

Senator DECONCINI. Mr. Chairman, thank you. I want to add my congratulations for the way you have handled the Judiciary Committee in general, and in specific, as to the Supreme Court nominees.

Judge Kennedy, we welcome you and your family here today. You are sitting with some of the most respected Members of Congress, Senator Wilson profound in his statement in support of you, and Representatives Fazio and Matsui. No one is more respected by this Senator, and I think by this committee, than the friends that you have by your side.

I want to first address the subject of advice. I'm not going to give you any advice, Judge Kennedy. I am going to say that I hope you do respond to questions as to your own feelings. In my judgment, that's the only way we know what you think about the law and the Constitution.

And contrary to my colleagues on the other side of the aisle, I think it would be a mistake to not do that. No one is going to ask you how you would have voted on the four-to-four decision that the Senator from Delaware just mentioned, dealing with abortion.

No one is going to be so presumptuous as to expect you to come forward and give opinions on matters that will be pending before the Court, or may be before the Court at the time.

But it is important for us to find out how you view the Constitution, and to question some of the decisions that you have made concerning stare decisis and other areas.

So Mr. Chairman, we are gathered together, once again, in this historic room, to begin what I think is perhaps our most important responsibility as a body.

I have said many times, confirmation of members to the Supreme Court, and perhaps, God forbid, having to declare war, are the two most important decisions a Senator is called upon to make.

The nomination of Judge Robert Bork divided this committee, as well as the Senate and the nation as a whole. I am hopeful that the nomination of Judge Anthony Kennedy will bring us back together, with the common purpose of determining objectively whether Judge Kennedy should be confirmed as an associate justice to the Supreme Court.

During the committee's and the Senate's consideration of Judge Bork, I found myself at the center of a bitter debate over the role of the Senate, and about the acceptability of Judge Bork as a justice.

Many on both sides of the Bork debate saw that nomination as an opportunity to advance their political goals. Judge Bork's supporters saw the nomination as a chance to create social and legal changes that they had been unable to create through other means.

Judge Bork's opponents saw the nomination as an opportunity to reverse the decline of their influence that had occurred under President Reagan's term.

Both sides used the nomination for fund raising, membership expansion, and personal attack on Members who happened to disagree with their side of the issue.

I found the rhetoric on both sides of this unfortunate circumstance not only inappropriate but very dissatisfying, distracting, and distasteful.

I accept it as part of the system. I make no criticism of anybody who engaged in such activity. I just expressed my view that I thought it was inappropriate.

I attempted to divorce political considerations from my decisionmaking. I urged my colleagues to wait until the record was complete before making up their minds.

I attempted to use the hearing to learn, and to gather information, rather than to bolster a preconceived notion about that nominee.

I have been pleased to receive a good deal of mail and in-person support for the deliberate approach I took to the Bork nomination. And while there are those, of course, who are still trying to make political hay out of the defeat of Judge Bork, I am glad that most have moved on, and approached the Kennedy nomination in what I consider to be a very appropriate manner.

We do not have everyone jumping out on this issue, and on this nomination, as we did before, for or against. We are more deliberate as a body and as Members. So I think the bad has turned into good; we all learned something, certainly this Senator did.

The nomination of any individual to the Supreme Court is of the highest importance. Even though we begin these hearings at the end of the congressional session, and during the holiday season, we must be careful, and be as thorough as possible in our consideration of the nominee.

I have had an opportunity to visit with you, Judge Kennedy. I appreciate the short time we had to discuss constitutional issues, and how you feel about them.

I have read over dozens of your opinions. I have read several transcripts of speeches that you have given. And I have talked to many attorneys and judges in the ninth circuit about your qualifications.

And I have had the personal pleasure of being in your company at ninth circuit judicial conferences, on occasion.

I do, however, have unanswered questions that I intend to ask you, Judge Kennedy, as a witness. I want to assure myself that you will apply the law of this nation, and our Constitution, in a consistent way.

I want to be sure that Judge Kennedy will be able to separate his personal views and philosophies from his judicial decisionmaking.

I want to know what those personal views may be, and I want to know how they may be applied. I want to satisfy myself that your

record as an appellate court judge does indeed display a separation of your personal and legal views when issuing opinions.

I am interested in learning how you intend to approach the different responsibilities of the Supreme Court, vis-a-vis the court of appeals.

I will be particularly interested, Judge Kennedy, in discussing with you your views on discrimination, equal protection, privacy, criminal procedures, and access to the court.

I want to hear your opinions on the roles that precedent and stare decisis play on the Supreme Court. And I am hopeful, Judge Kennedy, that you will answer these questions as forthrightly as you can, without intimidation, without feeling put on the spot, or that there is somebody out to get you, because there is no one here that I know of who is approaching this hearing in that way.

We are out to do our responsible duty, and I am very pleased that you have been chosen for the position. I am also very pleased that your attitude is one of a willingness to work with us, so we may come to a conclusion that will fill the vacant seat on the Supreme Court, and enable the country to move ahead.

Thank you, Judge Kennedy. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Our colleague from Iowa, Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Kennedy, let me add my welcome to you and your family. I particularly want to congratulate you on being chosen by President Reagan to serve on the Supreme Court.

Three months ago this committee convened for the purpose of assisting the Senate's advice and consent responsibility. Badly, in my judgment, the committee and the Senate managed to transform a narrow constitutional function into a full blown fear and smear campaign.

The advice and consent function, located as it is in the Executive Branch Article of the Constitution, simply cannot mean that the Senate's last word is to be the only word.

I begin these hearings full of hope that this nomination will return the Senate to its more traditional and appropriate role.

In the past, I have set out what I believe is a principled, three-part standard for evaluating a nominee. First, does a nominee possess knowledge of and respect for the Constitution as the precious inheritance that it is for all Americans, and as the sole rule of decision in constitutional cases?

Second, does the nominee have full appreciation of the separate functions between the unelected judiciary and the political branches?

Thirdly, will the nominee exercise self restraint? Self restraint, which makes a judge resist the temptation to revise or amend the Constitution according to that individual's view of what is good policy.

Mr. Chairman, I believe that this is a good occasion to repeat some often cited history about the third branch.

First, according to the framers, the judiciary was to be the "least dangerous" branch to the political rights guaranteed in the Constitution.

Second, courts are to make decisions based on the law rather than personal preference.

Courts derive their legitimacy and authority from this restriction. They lose both when they go beyond it.

As Justice Frankfurter once expressed it, and I quote: The ultimate touchstone of constitutionality is the Constitution itself; not what we have said about it, unquote.

Much of the furor of the past few months only underscores the fact that some prefer a judiciary that obliterates the delicate balance struck by the framers in the Constitution's first three articles; a judiciary whose acts have no roots in the text or history of the Constitution and laws; a judiciary with little regard for the consent of the governed or separated powers.

Of course, good intentions will be pleased by the defenders of an untethered judiciary. But good intentions ought not to prevail over the Constitution itself, if we are to be truly a nation of laws, not men.

Following the Bork hearings, a constituent of mine reminded me of the words of a former Iowa Congressman, John W. Gwynne. His words explain it quite plainly, and I quote: A constitution is a document written by people in their better moments * * * to protect themselves in their worst moments.

A constitution is not only to protect man from his enemies * * * but also from his friends, unquote.

Mr. Chairman, I thank you for scheduling these hearings as early as you did, and I look forward to them as I evaluate this nominee on the vital questions concerning the judicial branch. Thank you.

[The statement of Senator Grassley follows:]

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

STATEMENT OF SENATOR CHARLES E. GRASSLEY

ON THE NOMINATION OF ANTHONY M. KENNEDY

TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

DECEMBER 14, 1987

JUDGE KENNEDY, LET ME ADD MY WELCOME TO YOU AND YOUR FAMILY. I'D LIKE TO CONGRATULATE YOU ON BEING CHOSEN BY PRESIDENT REAGAN TO SERVE ON THE SUPREME COURT.

THREE MONTHS AGO THIS COMMITTEE CONVENED FOR THE PURPOSE OF ASSISTING THE SENATE'S ADVICE AND CONSENT RESPONSIBILITY. SADLY, IN MY JUDGMENT, THE COMMITTEE AND SENATE MANAGED TO TRANSFORM A NARROW CONSTITUTIONAL FUNCTION INTO A FULL-BLOWN, FEAR AND SMEAR CAMPAIGN.

THE ADVICE AND CONSENT FUNCTION -- LOCATED AS IT IS IN THE EXECUTIVE BRANCH ARTICLE OF THE CONSTITUTION -- SIMPLY CANNOT MEAN THAT THE SENATE'S LAST WORD IS TO BE THE ONLY WORD. I BEGIN THESE HEARINGS FULL OF HOPE THAT THIS NOMINATION WILL RETURN THE SENATE TO ITS MORE TRADITIONAL, AND APPROPRIATE ROLE.

IN THE PAST, I HAVE SET OUT WHAT I BELIEVE IS A PRINCIPLED, THREE-PART STANDARD FOR EVALUATING A NOMINEE:

(1) DOES THE NOMINEE POSSESS KNOWLEDGE OF AND RESPECT FOR THE CONSTITUTION AS A PRECIOUS INHERITANCE FOR ALL AMERICANS, AND AS THE SOLE RULE OF DECISION IN CONSTITUTIONAL CASES ?

(2) DOES THE NOMINEE HAVE FULL APPRECIATION OF THE SEPARATE FUNCTIONS BETWEEN THE UNELECTED JUDICIARY AND THE POLITICAL BRANCHES ? AND

(3) WILL THE NOMINEE EXERCISE SELF-RESTRAINT ? SELF-RESTRAINT WHICH MAKES A JUDGE RESIST THE TEMPTATION TO REVISE OR AMEND THE CONSTITUTION ACCORDING TO THAT INDIVIDUAL'S VIEW OF WHAT IS GOOD POLICY.

MR. CHAIRMAN, I BELIEVE THIS IS A GOOD OCCASION TO REPEAT SOME OFTEN-CITED HISTORY ABOUT THE THIRD BRANCH.

FIRST, ACCORDING TO THE FRAMERS, THE JUDICIARY WAS TO BE THE "LEAST DANGEROUS" BRANCH TO THE POLITICAL RIGHTS GUARANTEED IN THE CONSTITUTION.

SECOND, COURTS ARE TO MAKE DECISIONS BASED ON THE LAW RATHER THAN PERSONAL PREFERENCE. COURTS DERIVE THEIR LEGITIMACY AND AUTHORITY FROM THIS RESTRICTION. THEY LOSE BOTH WHEN THEY GO BEYOND IT. AS JUSTICE FRANKFURTER ONCE EXPRESSED IT: "THE ULTIMATE TOUCHSTONE OF CONSTITUTIONALITY IS THE CONSTITUTION ITSELF, NOT WHAT WE HAVE SAID ABOUT IT."

MUCH OF THE FUROR OF THE PAST FEW MONTHS ONLY UNDERSCORES THE FACT THAT SOME PREFER A JUDICIARY THAT OBLITERATES THE DELICATE BALANCE STRUCK BY THE FRAMERS IN THE CONSTITUTION'S FIRST THREE ARTICLES . . . A JUDICIARY WHOSE ACTS HAVE NO ROOTS IN THE TEXT OR HISTORY OF THE CONSTITUTION AND LAWS . . . A JUDICIARY WITH LITTLE REGARD FOR THE CONSENT OF THE GOVERNED OR SEPARATED POWERS.

OF COURSE, GOOD INTENTIONS WILL BE PLEADED BY THE DEFENDERS OF AN UNTETHERED JUDICIARY. BUT GOOD INTENTIONS OUGHT NOT TO PREVAIL OVER THE CONSTITUTION ITSELF, IF WE ARE TRULY TO BE A NATION OF LAWS, NOT MEN.

FOLLOWING THE BORK HEARINGS, A CONSTITUENT OF MINE REMINDED ME OF THE WORDS OF A FORMER IOWA CONGRESSMAN, JOHN WILLIAMS GWYNNE. HIS WORDS EXPLAINED IT QUITE PLAINLY:

> "A CONSTITUTION IS A DOCUMENT WRITTEN BY PEOPLE IN THEIR BETTER MOMENTS . . .
>
> TO PROTECT THEMSELVES IN THEIR WORST MOMENTS.
>
> A CONSTITUTION IS NOT ONLY TO PROTECT MAN FROM HIS ENEMIES . . . BUT ALSO FROM HIS FRIENDS."

MR. CHAIRMAN, I THANK YOU FOR SCHEDULING THESE HEARINGS, AND LOOK FORWARD TO THEM AS I EVALUATE THIS NOMINEE ON THE VITAL QUESTIONS CONCERNING THE JUDICIAL BRANCH. THANK YOU.

The CHAIRMAN. Thank you, Senator.

The Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman.

I am pleased to welcome Judge Kennedy and his family to the Judiciary Committee this morning in this historic room.

Today, the committee is gathering for the second time in less than 3 months to undertake one of our most important tasks: to hear the testimony of the President's nominee to the U.S. Supreme Court.

Our work here over the next few days actually is going to reflect the performance of three important duties.

First, we have a duty to the Senate to develop a complete and detailed record on all issues pertaining to the fitness of Judge Kennedy to serve on the Supreme Court, and to recommend to the Senate, based on that record, whether it should give its consent to this nomination.

Second, we have a duty to the Constitution, that magnificent charter whose 200th anniversary we celebrated this year. The men who wrote the Constitution recognized that the appointment of a Justice of the Supreme Court is too important a decision just to leave to one branch of government alone. They gave the President the power to nominate, but they entrusted the Senate with the power to withhold or give its consent. The fulfillment of this second duty also requires that we examine this nomination with extraordinary care.

Finally, of course, we have a duty to the American people. The decisions of the Supreme Court touch the lives of every citizen of our republic. We depend upon the Supreme Court as the ultimate guardian of our liberties. Whoever succeeds Justice Powell on the Supreme Court is going to play a pivotal role in defining the shape of those liberties, not only for us, but for our children; in your case, well into the next century. So our duty to the American people also requires us to act on the basis of a complete record that discloses, as well as it can be disclosed, what this nomination might mean for the future of those freedoms.

We have already begun to fulfill these three duties—to the Senate, to the Constitution, and to the American people—by studying Judge Kennedy's distinguished record as an attorney, as a professor of constitutional law, and, for the past 12 years, as a circuit court judge. The hearings that begin today are the next important step.

Three months ago—and we have had a lot of discussion about this today—this committee convened to carry out these same duties with respect to another nomination to the Supreme Court. The hearings on the nomination of Judge Robert Bork established three precedents that should guide our work in the days ahead.

First, the Bork hearings were wide-ranging, they were thorough, they were intensive. The hearings starting here today will share those features. I hope that every relevant aspect of the nominee's record is going to be thoroughly explored. Too much is at stake for the committee to falter in its obligation to develop a complete record, a complete record, on which to base its recommendation to the Senate.

Second, the Bork hearings focused on the judicial philosophy of the nominee: his approach to the Constitution, and to the role of the Supreme Court in discerning and enforcing its commands. The hearings today should have the same focus. No issue is more central to a decision on the appointment of a Justice of the Supreme Court; after all, it is the Court which under our system has the last word on what the Constitution means.

Now, one Senator today said, Judge, you are not to be badgered into answering improper questions. Well, those improper questions are not going to occur. But if they did, I do not think anybody on this panel thinks you could be badgered into anything.

Now, I met with you, and I know from our conversation, our private conversation, I think I know how you will answer. My advice is the same as I gave you then: Just answer honestly and candidly. Ignore any other advice of how you should or should not answer. Just be yourself. Be honest and be candid. Nobody is going to badger you; and even if they did, you are able to take care of yourself. As I said before, I cannot believe you could be badgered into anything. And you should not be able to be.

You are going to be asked about many aspects of your judicial philosophy, as reflected in your previous record. You will also be asked about many topics on which you have not previously spoken in public. Your responsiveness to these questions and your candor and your completeness, they are going to be important factors in the committee's ultimate recommendation.

Finally, these hearings, like the Bork hearings, will be fair. Judge Kennedy is going to be given every opportunity to explain his judicial philosophy, to put his record in context, and to respond to any criticisms that may be leveled. That is going to give this committee and the Senate and the American people the chance to see the whole picture before a decision is made on this nomination.

The hearings on Judge Bork's nomination set a precedent in another way as well. Never before in our history have the American people been so engaged and so involved in the debate not over one nomination but over the future of the Supreme Court. The public debate that accompanied the Bork nomination had its excesses and, as Senator DeConcini mentioned earlier, its low points, like every public debate in a democratic society. But on the whole, it was a positive example of our democratic system in government. It certainly was a positive example of the checks and balances.

Now, the decision on Justice Powell's successor remains the most important decision in the field of constitutional rights and responsibilities of this decade. It has been, and it must continue to be, a public decision, made on the basis of a public record and with the input of a concerned public. I hope that the high level of public interest continues. Debate on a nomination to the Supreme Court is in the best traditions of American citizenship.

I look forward, over the next few days, to learning more about Judge Kennedy's judicial philosophy and about his qualifications to serve on the Supreme Court.

Most importantly, these hearings carry out our duty to the U.S. Senate, to the Constitution and to the American people. We fulfill that duty if we are fair and thorough, and we fail our fellow Amer-

icans, the Constitution and the Senate if we are not. So I look forward to that challenge.

Finally, the most important witness, Judge Kennedy, is going to be yourself. Your testimony and really no one else's—either for or against you—will determine whether you become a Supreme Court Justice. Only you could stop eventual confirmation. I rather suspect you will not.

Mr. Chairman, I am going to have to leave for a few minutes for the reconciliation conference, and I will be back in time to hear the nominee. I thank you for your courtesy.

[The statement of Senator Leahy follows:]

U. S. SENATE JUDICIARY COMMITTEE

HEARINGS ON NOMINATION OF JUDGE ANTHONY M. KENNEDY
TO BE ASSOCIATE JUSTICE OF THE U. S. SUPREME COURT

DECEMBER 14, 1987, 10:00 A.M.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

I am pleased to welcome Judge Kennedy and his family to the Judiciary Committee this morning.

Today, the Committee gathers for the second time in less than three months to undertake one of our most important tasks: to hear the testimony of the President's nominee to the United States Supreme Court.

Our work here over the next few days actually will reflect the performance of three important duties.

First, we have a duty to the Senate, to develop a complete and detailed record on all issues pertaining to the fitness of Judge Kennedy to serve on the Supreme Court, and to recommend to the Senate, based on that record, whether it should give its consent to this nomination.

Second, we have a duty to the Constitution, that magnificent charter whose 200th anniversary we mark this year. The men who wrote the Constitution recognized that the appointment of a Justice of the Supreme Court is too important a decision to leave to one branch of government alone. They gave the President the power to nominate, but they entrusted to

the Senate the power to give or withhold its consent. The fulfillment of this second duty also requires that we examine this nomination with extraordinary care.

Finally, we have a duty to the American people. The decisions of the Supreme Court touch the lives of every citizen of our Republic. We depend upon the Supreme Court as the ultimate guardian of our liberties. Whoever succeeds Justice Powell on the Supreme Court will play a pivotal role in defining the shape of those liberties, not only for us, but also for our children, well into the next century. So our duty to the American people also requires us to act on the basis of a complete record that discloses, as well as it can be disclosed, what this nomination might mean for the future of our freedoms.

We have already begun to fulfill these three duties -- to the Senate, to the Constitution, and to the American people -- by studying Judge Kennedy's distinguished record as an attorney, as a professor of constitutional law, and, for the past twelve years, as a United States Circuit Judge. The hearings that begin today are the next important step.

Three months ago, this Committee convened to carry out these same duties with respect to another nomination to the Supreme Court. The hearings on the nomination of Judge Robert

Bork established three precedents that should guide our work in the days ahead.

First, the Bork hearings were wide-ranging, thorough, and intensive. These hearings will share those features. I hope that every relevant aspect of the nominee's record will be thoroughly explored. Too much is at stake for the Committee to falter in its obligation to develop a complete record on which to base its recommendation to the Senate.

Second, the Bork hearings focused on the judicial philosophy of the nominee: his approach to the Constitution, and to the role of the Supreme Court in discerning and enforcing its commands. These hearings should have the same focus. No issue is more central to a decision on the appointment of Justice of the Supreme Court, the court which under our system has the last word on what the Constitution means.

Judge Kennedy will be asked about many aspects of his judicial philosophy, as reflected in his previous record. He will also be asked about many topics on which he has not previously spoken in public. His responsiveness to these questions, and the candor and completeness of his answers, will be important factors in the Committee's ultimate recommendation.

Finally, these hearings, like the Bork hearings, will be fair. Judge Kennedy will be given every opportunity to explain his judicial philosophy, to put his record in context, and to respond to any criticisms that may be leveled. That will give this Committee, the Senate, and the American people the chance to see the whole picture before a decision is made on this nomination.

The hearings on Judge Bork's nomination set a precedent in another way as well. Never before in our history have the American people been so engaged and so involved in the debate over the future of the Supreme Court. The public debate that accompanied the Bork nomination had its excesses and its low points, like every public debate in a democratic society. But on the whole, it was a positive example of our democratic system in action.

The decision on Justice Powell's successor remains the most important decision in the field of constitutional rights and responsibilities of this decade. It has been, and it must continue to be, a public decision, made on the basis of a public record and with the input of concerned citizens. I hope that the high level of public interest continues. Public debate on a nomination to the Supreme Court is in the best traditions of American citizenship.

I look forward, over the next few days, to learning more about Judge Kennedy's judicial philosophy and about his qualifications to serve on the Supreme Court.

Most importantly - these hearings carry out our duty to the United States Senate, to the Constitution and to the American people. We fulfill that duty if we are fair and thorough - we fail our fellow Americans, the Constitution and the Senate if we are not. I look forward to the challenge.

The CHAIRMAN. Thank you very much.

The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Kennedy, I join my colleagues in welcoming you here. These hearings have already been described as harmonious, perhaps routine, and maybe less important than previous hearings. I frankly disagree with that for a number of reasons:

I believe that these hearings are very important to explore key issues on your record and your views; secondly, to proceed to develop the Senate's judgment on the proper scope of inquiry into a nominee's judicial philosophy; and, third, somewhat differently, to discharge the Senate's constitutional duty to scrutinize a Supreme Court nominee and make an independent judgment on the nominee's qualifications.

I disagree with those who have described your judicial approach as bland or vanilla. I yet do not know what flavor it is, but I am convinced that it is not vanilla. And we will have to wait until the final outcome of the hearings to see precisely where you fit into the tradition of constitutional jurisprudence.

In reading many of your opinions, in reading many of your speeches, I note very profound philosophical strains running through your approach to constitutional law. Those subjects that I think are appropriate and really very important for inquiry. I have noted your comment on executive power, for example, that Presidents have significant degrees of discretion in defining their constitutional powers. Today, there are many important issues on executive power which confront the nation, and specifically confront the Congress.

You have written landmark opinions on the good-faith exception to the exclusionary rule, a dissent which started the Supreme Court in that track. You have written a major opinion on the *Chadha* decision. You have written about legal realism and original intent. And during the course of the questioning, I think it is important to see just where you are in the tradition of constitutional jurisprudence.

When you and I talked privately, I commented on *Chadha* with respect to whether that might reflect your underlying view about the inadequacies of Congress's own action, and called your attention at that time to a very interesting statement, hardly bland, where you said in one of your speeches that:

> The ultimate question, then, is whether the *Chadha* decision will be the catalyst for some basic congressional changes. My view of this is not a sanguine one. I am not sure what it will take for Congress to confront its own lack of self-discipline, its own lack of party discipline, its own lack of principal course of action besides the ethic of ensuring its re-election.

I do not necessarily disagree with that conclusion, but the importance in an analysis of judicial philosophy is to what extent that underlying approach had an effect on your decision in *Chadha*. You have made a very interesting statement about original intent, a subject of really great importance in terms of where the court is going to go and how free Justices are to decide important constitutional issues, free perhaps, to some extent, at least from original intent. And you and I discussed this, again, at some length. I intend to pursue it, but your comment on a symposium was,

"There must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers." I think that is a subject which really requires some analysis.

You have moved from that position in a very erudite and philosophical speech on constitutional law on the right of privacy and the right to travel and the right to vote, and in that speech dealing with the right to privacy, recognize that right perhaps in fairly emphatic terms. I do not want to draw any conclusions. The speech speaks for itself. That will obviously be a subject of inquiry.

But one of the very profound statements that you made in that speech was your comparison of "essential rights in a just system or essential rights in our constitutional system." Then you say that the two are not coextensive, and I believe that that is a subject which requires some examination as to whether there really is a difference between a just system and our Constitution which speaks to a just system.

In that same speech, you made a reference to other constitutional provisions beyond the due process clause in a very interesting way, and inquired into the subject as to whether equal protection may have a broader application to homosexual rights than due process, which was the basis of the Supreme Court's decision in the *Bowers* case.

Then in conclusion, you had made a fascinating reference to arguable rights—you did not adopt them—as to education, nutrition, and housing; and you really looked away from them as rights embodied in the Constitution. But I do believe that your writings and your decisions—decisions on school desegregation, on comparable worth, on a large representation—pose really breadth of understanding and, as I read them, a balance and essential elements of judicial restraint, but not judicial restraint to the extent of being musclebound, in your interpretation of the Constitution. But there is a great deal in your record which I think warrants inquiry in our proceedings.

On the subject of judicial philosophy, our introductory statements today have already negated to some extent the conclusion of harmony in these hearings. You have already heard a fair difference of views. And the first question I asked of you when you and I sat down to talk—and I thank you for the almost 3 hours we spent together in two extensive sessions. The first question I asked you was whether you thought that judicial philosophy was an appropriate subject for inquiry. You said you thought that it was, and we proceeded to talk. And I did not ask you about your views on any specific cases, and I would not in private or in public. But I do believe that there are broad parameters which are appropriate for discussion. The only advice that I am going to give you on this subject is not to take any advice on this subject.

That was the first question I asked of Judge Bork as well, whether he thought judicial—we were talking about judicial ideology at that time, and Judge Bork said in response that he did not like the term "ideology" because it had some political connotations, but he thought judicial philosophy was an appropriate subject for inquiry.

And it is true that some nominees have answered to a lesser extent than have others. There was a very important article on

this subject written by a lawyer named William H. Rehnquist back in 1959, our current Chief Justice, when he took the Senate to task in Judge Whittaker's confirmation proceeding for not asking Judge Whittaker questions about due process of law and equal protection of the law, because Lawyer Rehnquist thought that that was indispensible in the Senate's discharge of its constitutional duties.

When the subject came up with Justice Rehnquist on his confirmation proceedings for Chief Justice, he did answer a fair number of questions in terms of the jurisdiction of the court and first amendment rights; and, of course, Justice Scalia answered very few questions, leading a number of us on this committee to consider a sense of the Senate resolution on the appropriate scope of the inquiry. And Judge Bork's proceedings led to an extensive examination of judicial philosophy. My own sense is that within appropriate parameters on generalized subjects it is appropriate. At least speaking for myself, I intend to pursue it very much as we did in our private discussions where no objection was raised to any of the questions which I had asked at that time.

The subject about our own independent role I think is one which warrants a comment or two. There is widespread misunderstanding about the Senate's role with many people thinking that it is a party matter for an automatic approval as to what nominee the President sends to the Senate. Some analogize it to the nomination of a Cabinet officer. My own sense is that it is fundamentally different from a Cabinet officer who serves the pleasure of the President and during the term of the President.

These proceedings constitute really the apex of the separation of power under our Constitution. All three branches are involved. The President makes the nomination; it is up to the Senate to consent or not; and then the nominee who is successful goes to the court and has the final word over both the executive branch and the legislative branch. So there are really very important issues involved.

I believe that the Senate has learned significantly from the confirmation proceedings as to Judge Bork. Prior to those hearings, many on this committee had expressed conclusions. As of this moment, that has not taken place. I think the Senate also learned the error of the so-called rolling vote; that when some 51 Senators had announced positions that then there was a call for Judge Bork to withdraw. To his credit—and I said so contemporaneously with his statement that Friday afternoon that he would not withdraw—he did not. But the proceedings as to Judge Bork lacked the Senate's deliberative process because so many Senators expressed conclusions without the benefit of a Judiciary Committee report and without the benefit of the debate. I think that we have learned from that.

As Judge Bork urged, voices should be lowered, and I think they have been lowered. So I think progress has been made on all sides.

It is an inexact process, I think. We all have a great deal to learn from it, and I think that the great public attention and the great public focus on these nominations is very much in the national interest.

In conclusion, I think it worth just a brief comment about one of your concluding statements to me when we finished our brief discussion about 10 days ago, when you said did I think it was appro-

priate under the advice and consent function for the Senate to give advice to a nominee. And I responded that I thought that was up to the nominee. But in the informal sessions which you have had with all of us—and you had expressed this to me—you saw a keen sense of interest by the Judiciary Committee, and it is reflected in the entire Senate. And what we say to you both privately and publicly reflects our own views which are distilled significantly from representation, the majoritarian position we have as elected officials.

So I do think there is something that we all learn from these processes, and that an appropriate range of discussion—and I emphasize the word "appropriate." We should not go too far, but we should go far enough. That is what, speaking for myself, I will attempt to do.

Thank you very much, Mr. Chairman.

The CHAIRMAN. One thing you can be assured of, Judge, is you will find the spectrum covered in this committee on the type of advice you get. And it is all cost free.

The Senator from Alabama, Senator Heflin.

Senator HEFLIN. Mr. Chairman, I commend you for moving rapidly in regards to these hearings. On November the 11th, Armistice Day, Veterans' Day, Judge Kennedy was nominated. Here, 34 days later, we are conducting his hearings. They have been set in the closing week of this session of Congress when much activity is going on in various matters and their will, of course, require the presence of members of this committee on the floor and in other places.

Nevertheless, I feel that the Supreme Court needs the ninth member, and I congratulate you on the effort to bring these hearings to a speedy focus and on the effort for us to proceed.

Two hundred years ago, the framers of the Constitution captured the spirit of a struggling new nation in 52 words. These words form the Preamble of the Constitution. I think most of us are familiar with it, but just to set the tone for it I will quote a little of it.

> We the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquility.

I think we ought to look at the first three words of the Preamble, "We the people." That is what this nation is all about, and that is why the Constitution is so important, because it protects the rights of all people: conservatives and liberals, extremists and moderates, young and old, men and women, rich and poor. Some may argue that the ability of the Constitution to be all-encompassing is its greatest weakness. I would argue, therein lies its greatest strength.

The Constitution is the cornerstone of our democracy, and if we are to protect it, we must entrust it to men and women who will respect its principles and its parameters. That is our function today: to determine the fitness of this nominee for a lifetime position on the Supreme Court. As Senators, we have a constitutional mandate to provide advice and consent on this nomination.

Judge Kennedy, in your questionnaire, you listed what you consider to be the attributes of a good judge: compassion, warmth, sensitivity, and an unyielding insistence on justice. I could not agree with you more. But let me add two additional criteria: an understanding of the proper role of the judiciary as expressed in the Con-

stitution, and a deep belief in and an unfaltering support for an independent judiciary.

Judge Kennedy, in these hearings you will be questioned on your views of the Constitution, your judicial philosophy, your commitment to equal justice under the law. Your speeches will be scrutinized, and some of your opinions will be criticized. It is my hope that you will respond to our questions as thoroughly as possible in order that we may be better able to understand not just Judge Kennedy, the lawyer or the judge, but Judge Kennedy, the man.

In fulfilling my responsibility of advice and consent, I will keep an open mind as I have endeavored to do in every other judicial confirmation hearing. I believe the confirmation process should be exercised in a judicial manner, without pre-decision leanings, biases, or allegiances. To act otherwise makes the hearing procedure a waste of time or a perfunctory process.

My decision will be based on my own, and no one else's, assessment of your commitment to the judicial system, the American people and the Constitution. I am in full agreement with the late Senator Sam Ervin when he said:

> Our greatest possession is not the vast domain; it is not our beautiful mountains or our fertile prairies or our magnificent coastline. It is not our great productive capacity; it is not the might of our Army or Navy. These things are of great importance. But in my judgment, the greatest and most precious possession of the American people is the Constitution.

Judge Kennedy, if confirmed, you will be charged with safeguarding this most precious possession. The words in the Preamble of the Constitution are not mere words in a document; they are our lifeline. Judge Kennedy, it is a lifeline that you will be charged with protecting, and one that must be extended to all. Judge Kennedy, it is a life line—one that must be extended to all—that you will be charged with protecting.

Following the rejection of Judge Bork and the self-withdrawal of Judge Ginsburg, the spotlights of the Justice Department, the media, the various Bar Associations, outside partisan and special interest groups, and the investigative forces of this committee have focused on you. Thorough and exhaustive investigations have been conducted. Your life history has been carefully dissected during the past 34 days. Your opinions have been reviewed under a searching judicial microscope. Your speeches have been read, re-read, and read between the lines. Every closet in your life has been opened; a few skeletons have been found. But thus far, none of the bones are rattling.

You are off to a good start, and I wish you good luck.

[The statement of Senator Heflin follows:]

STATEMENT OF SENATOR HOWELL HEFLIN
ON THE NOMINATION OF JUDGE ANTHONY M. KENNEDY
TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT
DECEMBER 14, 1987

MR. CHAIRMAN:

I COMMEND YOU FOR MOVING RAPIDLY IN REGARDS TO THESE HEARINGS. ON NOVEMBER THE 11TH, ARMISTICE DAY, VETERANS' DAY, JUDGE KENNEDY WAS NOMINATED. HERE, 34 DAYS LATER, WE ARE CONDUCTING HIS HEARINGS. THEY HAVE BEEN SET IN THE CLOSING WEEK OF THIS SESSION OF CONGRESS WHEN MUCH ACTIVITY IS GOING ON IN VARIOUS MATTERS AND WILL, OF COURSE, REQUIRE THE PRESENCE OF MEMBERS OF THIS COMMITTEE ON THE FLOOR AND OTHER PLACES.

NEVERTHELESS, I FEEL THAT THE SUPREME COURT NEEDS THE NINTH MEMBER, AND I CONGRATULATE YOU ON THE EFFORT TO BRING THESE HEARINGS TO A SPEEDY FOCUS AND FOR US TO PROCEED.

TWO HUNDRED YEARS AGO THE FRAMERS OF THE CONSTITUTION CAPTURED THE SPIRIT OF A STRUGGLING NEW NATION IN FIFTY-TWO WORDS. THESE WORDS FORM THE PREAMBLE OF THE CONSTITUTION. I THINK MOST OF US ARE FAMILIAR WITH IT, BUT JUST TO SET THE TONE FOR IT I WILL QUOTE A LITTLE OF IT. "WE THE PEOPLE OF THE UNITED STATES, IN ORDER TO FORM A MORE PERFECT UNION, ESTABLISH JUSTICE, INSURE DOMESTIC TRANQUILITY."

I THINK WE OUGHT TO LOOK AT THE FIRST THREE WORDS OF THE PREAMBLE: WE THE PEOPLE. THAT IS WHAT THIS NATION IS ALL ABOUT. AND THAT IS WHY THE CONSTITUTION IS SO IMPORTANT -- BECAUSE IT PROTECTS THE RIGHTS OF ALL PEOPLE -- CONSERVATIVES AND LIBERALS, EXTREMISTS AND MODERATES, YOUNG AND OLD, MEN AND WOMEN, RICH AND POOR. SOME MAY ARGUE THAT THE ABILITY OF THE CONSTITUTION TO BE ALL ENCOMPASSING IS ITS GREATEST WEAKNESS. I WOULD ARGUE, THEREIN LIES ITS GREATEST STRENGTH.

THE CONSTITUTION IS THE CORNERSTONE OF OUR DEMOCRACY, AND IF WE ARE TO PROTECT IT, WE MUST ENTRUST IT TO MEN AND WOMEN WHO WILL RESPECT ITS PRINCIPLES AND PARAMETERS. THAT IS OUR FUNCTION TODAY, TO DETERMINE THE FITNESS OF THIS NOMINEE FOR A LIFETIME POSITION ON THE SUPREME COURT. AS SENATORS WE HAVE A CONSTITUTIONAL MANDATE TO PROVIDE ADVICE AND CONSENT ON THIS NOMINATION.

JUDGE KENNEDY, IN YOUR QUESTIONNAIRE YOU LISTED WHAT YOU CONSIDER TO BE THE ATTRIBUTES OF A GOOD JUDGE: "COMPASSION, WARMTH, SENSITIVITY AND AN UNYIELDING INSISTENCE ON JUSTICE." I COULD NOT AGREE WITH YOU MORE. BUT LET ME ADD TWO ADDITIONAL CRITERIA: AN UNDERSTANDING OF THE PROPER ROLE OF THE JUDICIARY AS EXPRESSED IN THE CONSTITUTION, AND A DEEP BELIEF IN, AND UNFALTERING SUPPORT FOR, AN INDEPENDENT JUDICIARY.

JUDGE KENNEDY, IN THESE HEARINGS YOU WILL BE QUESTIONED ABOUT YOUR VIEWS OF THE CONSTITUTION, YOUR JUDICIAL PHILOSOPHY, AND YOUR COMMITMENT TO EQUAL JUSTICE UNDER THE LAW. YOUR SPEECHES WILL BE SCRUTINIZED, SOME OF YOUR OPINIONS WILL BE CRITICIZED.

IT IS MY HOPE THAT YOU WILL RESPOND TO OUR QUESTIONS AS THOROUGHLY AS POSSIBLE SO THAT WE WILL BE BETTER ABLE TO UNDERSTAND, NOT JUST JUDGE KENNEDY, THE LAWYER OR THE JUDGE, BUT JUDGE KENNEDY THE MAN.

IN FULFILLING MY RESPONSIBILITY OF ADVICE AND CONSENT, I WILL KEEP AN OPEN MIND AS I HAVE ENDEAVORED TO DO IN EVERY OTHER JUDICIAL CONFIRMATION HEARING. I BELIEVE THE CONFIRMATION PROCESS SHOULD BE EXERCISED IN A JUDICIAL MANNER WITHOUT PRE-DECISION LEANINGS, BIAS OR ALLEGIANCES. TO ACT OTHERWISE MAKES THE HEARING PROCEDURE A WASTE OF TIME OR A PERFUNCTORY PROCESS. MY DECISION WILL BE BASED ON MY <u>OWN</u> AND NO ONE ELSE'S ASSESSMENT OF YOUR COMMITMENT TO THE JUDICIAL SYSTEM, THE AMERICAN PEOPLE AND THE CONSTITUTION.

I AM IN FULL AGREEMENT WITH THE LATE SENATOR SAM ERVIN WHEN HE SAID:

"OUR GREATEST POSSESSION IS NOT THE VAST DOMAIN, IT'S NOT OUR BEAUTIFUL MOUNTAINS, OR OUR FERTILE PRAIRIES, OR OUR

MAGNIFICENT COASTLINE. IT'S NOT OUR GREAT PRODUCTIVE CAPACITY. IT IS NOT THE MIGHT OF OUR ARMY OR NAVY. THESE THINGS ARE OF GREAT IMPORTANCE BUT IN MY JUDGEMENT, THE GREATEST AND MOST PRECIOUS POSSESSION OF THE AMERICAN PEOPLE IS THE CONSTITUTION."

JUDGE KENNEDY, IF CONFIRMED, YOU WILL BE CHARGED WITH SAFEGUARDING THIS MOST PRECIOUS POSSESSION.

THE WORDS IN THE PREAMBLE OF THE CONSTITUTION ARE NOT MERE WORDS IN A DOCUMENT. THEY ARE OUR LIFELINE. JUDGE KENNEDY, IT IS A LIFELINE THAT YOU WILL BE CHARGED WITH PROTECTING, AND ONE WHICH MUST BE EXTENDED TO ALL.

FOLLOWING THE REFECTION OF JUDGE BORK AND THE SELF-WITHDRAWAL OF JUDGE GINSBURG, THE SPOTLIGHTS OF THE JUSTICE DEPARTMENT, THE MEDIA, THE VARIOUS BAR ASSOCIATIONS, OUTSIDE PARTISAN AND SPECIAL INTEREST GROUPS, AND THE INVESTIGATIVE FORCES OF THIS COMMITTEE HAVE FOCUSED ON YOU. THOROUGH AND EXHAUSTIVE INVESTIGATIONS HAVE BEEN CONDUCTED. YOUR LIFE HISTORY HAS BEEN CAREFULLY DISSECTED DURING THE PAST 34 DAYS. YOUR OPINIONS HAVE REVIEWED UNDER A SEARCHING JUDICIAL MICROSCOPE. YOUR SPEECHES HAVE BEEN READ, RE-READ, AND READ BETWEEN THE LINES. EVERY CLOSET IN YOUR LIFE HAS BEEN OPENED; A FEW SKELETONS HAVE BEEN FOUND. BUT THUS FAR, NONE OF THE BONES ARE RATTLING.

The CHAIRMAN. Thank you, Senator, for that colorful description. [Laughter.]

Maybe the Senator from New Hampshire can conclude and put some flesh on the bones for us. Senator Humphrey.

Senator HUMPHREY. Thank you, Mr. Chairman.

Judge Kennedy, congratulations on your nomination, and welcome to you and each member of your family. My colleagues have said, I think, all that needs to be said at this point—perhaps more than needs to be said at this point. I will make a contribution to efficiency rare around this place by putting my statement in the record.

[The statement of Senator Humphrey follows:]

SENATE JUDICIARY COMMITTEE
HEARINGS ON THE NOMINATION OF JUDGE ANTHONY KENNEDY
FOR THE U.S. SUPREME COURT
DECEMBER 14, 1987

STATEMENT OF SENATOR GORDON J. HUMPHREY

JUDGE KENNEDY, WELCOME TO THESE COMMITTEE HEARINGS.

I BELIEVE IT TAKES SPECIAL CHARACTER AND COMMITMENT TO SUBMIT TO A PROCESS WHICH HAS NOW BECOME A PUBLIC ORDEAL. I APPLAUD YOUR WILLINGNESS TO GO THROUGH THIS GRUELLING PROCESS FOR THE GOOD OF THE COUNTRY AND THE COURT.

I WILL MAKE NO SECRET OF THE FACT THAT I DEEPLY REGRET THE SENATE'S REFUSAL TO CONFIRM JUDGE BORK FOR THIS VACANCY. HE WAS UNIQUELY QUALIFIED TO MAKE A VALUABLE CONTRIBUTION TO THE COURT'S WORK AND THE HEALTHY DEVELOPMENT OF OUR LAW. HE WOULD HAVE BROUGHT A PROFOUND APPRECIATION FOR THE LIMITS OF THE JUDICIAL ROLE TO THE HIGH COURT -- LIMITS WHICH THE COURTS TOO FREQUENTLY IGNORE IN THIS ERA OF JUDICIAL POLICY-MAKING.

IT IS A GENUINE HISTORICAL TRAGEDY THAT THE PUBLIC DISTORTION OF JUDGE BORK'S RECORD KEPT HIM FROM THE SEAT WHICH HE SO CLEARLY DESERVED TO FILL.

BUT THAT BATTLE IS OVER, FOR NOW, AND IT IS TIME TO MOVE ON. IF NOTHING ELSE, I HOPE THAT LESSONS LEARNED FROM THE EXCESSES OF THE BORK HEARINGS WILL LEAD TO MORE RESTRAINED TREATMENT OF JUDGE KENNEDY AND THE NOMINEES OF FUTURE YEARS.

I HAVE CAREFULLY EXPLORED JUDGE KENNEDY'S EXTENSIVE JUDICIAL RECORD, AND IT IS A SOUND AND RESPONSIBLE ONE. IT SHOWS PROPER RESPECT FOR THE LANGUAGE AND PRINCIPLES OF THE CONSTITUTION, AND FOR THE DEMOCRATIC PREROGATIVES OF THE ELECTED LAWMAKERS. IT GENERALLY SHOWS KEEN APPRECIATION FOR FOR THE OBLIGATIONS AND LIMITATIONS OF THE JUDICIAL ROLE.

HIS OPINIONS IN THE CRIMINAL LAW AREA ARE ESPECIALLY COMMENDABLE. IN SOME OF THE MOST IMPORTANT CRIMINAL LAW CONTROVERSIES OF THE DAY, JUDGE KENNEDY'S OPINIONS AND DISSENTS HAVE LATER BEEN FOLLOWED BY THE SUPREME COURT. HIS SOUND REASONING HAS LED HIM TO REJECT ATTEMPTS TO HAMPER LAW ENFORCEMENT WITH ARTIFICIAL BARS TO THE USE OF RELEVANT EVIDENCE AGAINST DANGEROUS CRIMINALS. AT THE SAME TIME, HE HAS TAKEN STRONG STANDS TO UPHOLD THE RIGHTS OF THE ACCUSED AND REVERSE CONVICTIONS WHERE THE CONSTITUTION REQUIRES.

IN A DIFFERENT AREA, JUDGE KENNEDY'S OPINION IN THE COMPARABLE WORTH CASE OF AFSCME V. STATE OF WASHINGTON WAS ONE OF THE MOST IMPORTANT COURT OF APPEALS DECISIONS OF THE DECADE. THAT DECISION PROPERLY REJECTED AN EXTREME INTERPRETATION OF TITLE VII WHICH WOULD HAVE COST THE STATE OF WASHINGTON NEARLY ONE **BILLION** DOLLARS AND UNDERMINED THE MOST FUNDAMENTAL PREMISES OF A RATIONAL, COMPETITIVE LABOR MARKET. MORE IMPORTANTLY, IT UPHELD THE PRINCIPLE THAT LEGISLATURES, NOT COURTS, SHOULD MAKE THE POLICY DECISIONS GOVERNING OUR SOCIAL AND ECONOMIC WELFARE.

I CANNOT AGREE WITH ALL OF JUDGE KENNEDY'S OPINIONS. IN A FEW CASES -- SUCH AS HIS EXPANSIVE DISCUSSION OF SUBSTANTIVE DUE PROCESS IN THE CASE OF BELLER V. MIDDENDORF -- HE HAS SEEMED TO STRAY SOMEWHAT FROM THE PRINCIPLE OF JUDICIAL RESTRAINT WHICH HE USUALLY FOLLOWS. BUT EVEN IN THAT CASE HE REACHED THE CORRECT RESULT, AS LATER CONFIRMED BY THE SUPREME COURT'S DECISION IN BOWERS V. HARDWICK.

ON THE WHOLE, HIS JUDICIAL RECORD IS EXEMPLARY AND SOUND. ANY ATTEMPT TO SUGGEST THAT JUDGE KENNEDY IS NOT WITHIN THE SO-CALLED "MAINSTREAM" IS IMPLAUSIBLE. EVEN THOSE OF HIS OPINIONS WHICH MAY BE CRITICIZED BY HOSTILE WITNESSES -- SUCH AS HIS COMPARABLE WORTH OPINION AND HIS DECISION UPHOLDING THE NAVY'S RIGHT TO DISCHARGE HOMOSEXUALS IN THE BELLER CASE -- ARE CONSISTENT WITH RESULTS REACHED BY NUMEROUS OTHER FEDERAL APPEALS COURTS.

THE TEST FOR ME, THOUGH, IS NOT WHETHER HE IS WITHIN SOME SELECTIVE NOTION OF THE "MAINSTREAM"; IT IS WHETHER HE IS FAITHFUL TO THE CONSTITUTION AND THE LIMITS OF THE JUDICIAL ROLE.

FROM WHAT I'VE SEEN AND READ SO FAR, JUDGE KENNEDY SHOULD PASS THAT MORE IMPORTANT TEST. I HOPE HIS TESTIMONY AND HIS ANSWERS TO MY COLLEAGUES' QUESTIONS WILL REENFORCE THAT BELIEF.

The CHAIRMAN. Thank you, Senator.

The Senator from Ohio.

Senator METZENBAUM. Following Senator Humphrey's lead, Senator Simon asked me to put his statement in the record as well.

The CHAIRMAN. I am sure they will be compatible. Without objection, both will be entered.

[The statement of Senator Simon follows:]

Opening Statement of Senator Simon

Judge Kennedy, I would like to welcome you and your family this morning.

If you are confirmed as the next Associate Justice of the Supreme Court, you will be asked to decide some of the most sensitive and controversial issues of American life. The Supreme Court has a special role in making good the promise of liberty in our Constitution. The words that say it best have been carved across the entrance to the Court itself: "Equal Justice Under Law." That is what the Supreme Court represents, and so should every Justice of that Court.

Unlike most of my colleagues on the Committee, I am not a lawyer, so I will not be asking about technical legal rules or doctrines. My concern is this basic one--will Judge Kennedy be fair? Will he be sensitive to individual rights? Will he safeguard the constitutional protections of all Americans? Will he pay particular regard to the rights of women, to the rights of minorities, sometimes ignored in our nation's history? Will he represent "Equal Justice Under Law"?

I want a nominee who is open-minded, not a man with a mission; a judge who will listen carefully to every argument and decide on the basis of law, not philosophy. I want a Supreme Court Justice who understands and applies not only the letter of the Constitution, but its spirit as well. These are the qualities I looked for in Judge Bork, and they are the criteria I will apply to any Supreme Court nominee.

Judge Kennedy, I have reviewed your record on the federal bench and I see some very positive signs. But I do have some concerns, and some questions. I look forward to your testimony.

The CHAIRMAN. Now, it is 12:00 o'clock. I think rather than swear you right now, Judge—which I was going to do—to the great disappointment of the photographers—who I enjoy disappointing on occasion in light of the pictures I see of myself in the press—I think what we will do is we will wait until 1 o'clock, bring you back, swear you in, and then I will ask you to introduce your family, make your opening statement. Then we will begin the first round of questioning.

Judge KENNEDY. Thank you, Senator.

The CHAIRMAN. We will reconvene at 1 o'clock. The hearing is recessed until then.

[Whereupon, at 11:58 a.m., the committee recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

I yield to my colleague from South Carolina.

Senator THURMOND. Mr. Chairman, Senator Bob Dole has sent over a statement to be placed in the record favoring Judge Kennedy's confirmation to the Supreme Court. I ask unanimous consent it be put in the record.

The CHAIRMAN. Without objection, it will be placed in the record.

[The statement of Senator Dole follows:]

STATEMENT OF SENATOR BOB DOLE

CONFIRMATION HEARINGS FOR JUDGE ANTHONY M. KENNEDY

MR. CHAIRMAN:

IT IS A GREAT PRIVILEGE TO SPEAK ON BEHALF OF JUDGE ANTHONY M. KENNEDY, WHO HAS BEEN NOMINATED TO SERVE AS AN ASSOCIATE JUSTICE ON THE SUPREME COURT.

FILLING THIS SEAT, AS EVERYONE IS WELL AWARE, HAS BEEN A TRIAL -- SO TO SPEAK. BUT IN JUDGE KENNEDY, I BELIEVE PRESIDENT REAGAN HAS NOMINATED A JURIST WHO FULFILLS ALL THE MOST IMPORTANT REQUIREMENTS OF SUCH AN IMPORTANT POSITION..

JUDGE KENNEDY IS A GRADUATE OF STANFORD UNIVERSITY AND HARVARD LAW SCHOOL, AND HAS STUDIED AT THE LONDON SCHOOL OF ECONOMICS. HE PURSUED A SUCCESSFUL CAREER IN PRIVATE PRACTICE, AND HAS SERVED AS PROFESSOR OF CONSTITUTIONAL LAW AT THE MCGEORGE SCHOOL OF LAW AT THE UNIVERSITY OF THE PACIFIC.

SINCE 1976 ,JUDGE KENNEDY HAS SERVED AS A MEMBER OF THE UNITED STATES COURT OF APPEALS FOR THE 9TH CIRCUIT, WHICH INCLUDES ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, MONTANA, NEVADA, OREGON, AND WASHINGTON. DURING HIS TENURE AS AN APPELLATE JUDGE HE HAS HANDED DOWN LITERALLY HUNDREDS OF OPINIONS. THOSE, COMBINED WITH HIS WRITINGS, PROVIDE AN LARGE

BODY OF WORK TO ILLUSTRATE JUDGE KENNEDY'S JUDICIAL PHILOSOPHY. AND NONE OF THESE POSITIONS ARE SO EXTREME THAT THEY FELL OUTSIDE THE MAINSTREAM OF AMERICAN OPINION.

IN FACT, JUDGE KENNEDY'S WORK IS OF SUCH A CALIBER THAT THE AMERICAN BAR ASSOCIATION UNANIMOUSLY VOTED HIM ITS HIGHEST APPROVAL RATING.

MR. CHAIRMAN, THERE HAS BEEN AN EMPTY SEAT ON THE SUPREME COURT SINCE SUMMER. ALREADY THIS TERM, THE COURT HAS HAD TO AFFIRM A NUMBER OF SIGNIFICANT CASES BECAUSE OF SPLIT DECISIONS. THIS IS NO WAY FOR THE HIGHEST COURT IN THE LAND TO FUNCTION. IT IS A DISSERVICE TO THE AMERICAN PEOPLE, AND TO OUR SYSTEM OF JUSTICE.

IN JUDGE KENNEDY WE HAVE A JURIST WITH IMPECCABLE PROFESSIONAL AND PERSONAL CREDENTIALS -- A CONSERVATIVE IN THE FINE TRADITION OF JUDGE LEWIS POWELL, THE JUDGE HE IS REPLACING. I WOULD NEVER ADVOCATE EITHER THIS COMMITTEE OR THE SENATE AS A WHOLE RUSHING THROUGH THE CONFIRMATION PROCESS. BUT WE DO NEED TO ACT EXPEDITIOUSLY. AND WITH AS QUALIFIED A CANDIDATE AS JUDGE KENNEDY IT SHOULD NOT BE DIFFICULT TO DO.

SO, MR. CHAIRMAN I HOPE THAT THIS COMMITTEE, AND THE ENTIRE SENATE, WILL CONFIRM THE KENNEDY NOMINATION, SO THAT HE CAN TAKE HIS PLACE ON THE BENCH SHORTLY AFTER THE NEW YEAR AND SO THE SUPREME COURT CAN MOVE FORWARD TO CARRY OUT ITS IMPORTANT RESPONSIBILITIES.

The CHAIRMAN. Judge, would you stand to be sworn?

Do you swear that the testimony you are about to give will be the whole truth and nothing but the truth, so help you God?

Judge KENNEDY. I do so swear.

The CHAIRMAN. Thank you, Judge. Welcome back.

Do you have an opening statement you would like to make?

TESTIMONY OF HON. ANTHONY M. KENNEDY TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

Judge KENNEDY. Thank you, Senator; if I may make just a few remarks.

The CHAIRMAN. Take as much time as you like.

Judge KENNEDY. I most appreciate the gracious welcome from the members of the committee this morning, from Senator Wilson and from the two distinguished Congressmen from their districts in Sacramento, all three of whom I have known for a number of years.

This is an appropriate time for me to thank the President for entrusting me with the honor of appearing before you as his nominee for Associate Justice of the United States. My family shares in extending our deep and great appreciation for this or his confidence in me.

I wish also to thank the members of your committee, Mr. Chairman, for the most interesting and impressive set of meetings that I have had with you and Members of the Senate as a whole over the last 4 weeks. These are denominated "courtesy calls" in the common parlance, as I understand it. It seems to me that that is perhaps a somewhat casual term for what is a very important and significant part of the advice and consent process.

In a number of these advise and consent discussions, Mr. Chairman, you or your colleagues indicated that you wanted to explain to me your own views, your own convictions, your own ideas, your own concerns about the Constitution of the United States. You have indicated that no reply or response was expected from me. And in every case, Mr. Chairman, I was profoundly impressed by the deep commitment to constitutional rule and the deep commitment to judicial independence that each Member of the United States Senate has.

I wish your workload were such that you could give the experience that I have had to every nominee for appointment to the courts in the article III system.

Now, Mr. Chairman, I understand that it is appropriate, and at your invitation, to introduce my family who are here with me.

The CHAIRMAN. Please do.

Judge KENNEDY. My oldest son, Justin, is a recent graduate of Stanford and is now an assistant project manager for a major corporate relocation in Sacramento. We are delighted to have him home with us in Sacramento.

His brother, Gregory, our other son, is a senior at Stanford, and I am authorized to assure the committee that he has taken the LSAT test and is on his way to law school.

Our youngest child is Kristin, who is now a sophomore at Stanford majoring in liberal arts, particularly English and history.

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Finally, my wife Mary, who has the love and admiration of our family and also of her 30 students in the Golden Empire School in Sacramento. They most appreciate your invitation to be with us here today, Mr. Chairman.

Thank you very much.

The CHAIRMAN. We welcome you all here. I surely do not envy your tuition bill. [Laughter.]

Judge KENNEDY. I am glad that is part of the record, Mr. Chairman.

The CHAIRMAN. It is a sacrifice you are making, and I mean that sincerely.

Please move forward, Judge, if you would like.

Judge KENNEDY. That concludes my opening remarks, Mr. Chairman. I am ready to receive questions from you and your committee members.

The CHAIRMAN. Judge, let me explain to you, and to my colleagues, how the ranking member and I would like to proceed today. That is, as has been the custom in the recent past, we will allow each Senator to question you up to a half an hour, hopefully to have some continuity to the questions, and allow both you full time to answer the questions and they to flesh out the line of questioning they wish to pursue.

It is my hope, although not my expectation, that we will complete one round of questioning today. We will stop, though, at 6 o'clock, or as close to 6 o'clock as we can get. And at approximately 3:15, we will take a break for 15 minutes or so to give you an opportunity to stretch your legs and maybe get a cup of coffee or whatever you would like.

Judge, I will begin my first round here by telling you at the outset that I would like to pursue or touch on three areas in my first round. One is the question of unenumerated rights, and if there are such, if they exist under our Constitution. Secondly, as a matter, quite frankly, more of housekeeping and for the record, with you under oath, I would like to question you about your meetings with Justice Department, White House and other officials, and whether or not any commitments were elicited or made. I quite frankly must tell you at the outset I have had long discussions and full cooperation from the White House in this matter, and I am satisfied; but I think we should have it under oath what transpired and what did not.

Thirdly, if time permits—which it probably will not—I would like to discuss with you a little bit about your views on the role of precedent as a Supreme Court Justice. Ofttimes, it is mentioned here that we unanimously voted for you when you came up as a circuit court appointee, and that is an honor. You are to be congratulated. But as you well know, we unanimously vote for almost everybody who comes up. Ninety-eight percent of all those that come before the Congress are unanimously approved of. That is in no way to denigrate the support shown to you by us in your previous appearance here, but it is to indicate that, as you know better than most of us, the role of a lower court judge and the role of a Supreme Court judge are different. They are both to seek out and find justice under the Constitution, but lower court judges are bound by precedent. They do not have the authority, the constitu-

tional authority to alter Supreme Court decisions. But as a Supreme Court Justice, you obviously will have that authority, and I would like at some point to discuss to what extent you think that authority resides in a member of the court.

Judge Kennedy, let me begin, though, with the unenumerated rights question, which occupied a great deal of our time in the prior hearing—not your prior hearing, but the prior hearing with Judge Bork.

Judge Kennedy, in your 1986 speech on unenumerated rights which, if I am not mistaken—I have a copy of it here—was entitled "Unenumerated Rights and the Dictates of Judicial Restraint," in that speech you place great emphasis on the specific text of the Constitution as a guidepost for the court. You said, for example—and I quote from the concluding page of that speech—

> I recognize, too, that saying the constitutional text must be our principal reference is in a sense simply to restate the question what that text means. But uncertainty over precise standards of interpretation does not justify failing to attempt to construct them, and still less does it justify flagrant departures.

What we find out today, or at least I do, is how you go about attempting to construct such standards of interpretation. As I read your speech you were concerned that unenumerated rights articulated by the Supreme Court, such as the right of privacy, but not exclusively limited to that, in your words "have a readily discernible basis in the Constitution." But you also recognize, Judge Kennedy, that the text of the Constitution is not always, to use your phrase, I believe, "a definitive guide."

On two separate occasions, in August of 1987 and February of 1984, you have described the Due Process Clause, which, of course, contains the word "liberty," the 14th amendment. You described that as a spacious phrase. That seems to—well, let me not suggest what it suggests.

The point I want to raise with you is there seems to be an underlying tension here; that you talk about liberty as being a spacious phrase, and you insist at the same time that the constitutional text must be our principal reference.

Although I have my own view of what you mean by that—and they are not incompatible, those two phrases, as I see it—I would like you to give us your view of the liberty clause. Do you believe that the textual reference to liberty in the 5th and 14th amendments and in the Preamble of the Constitution provides a basis for certain fundamental unenumerated rights?

Judge KENNEDY. Senator, of course, the great tension, the great debate, the great duality in constitutional law—and this has been true since the court first undertook to interpret the Constitution 200 years ago—has been between what the text says and what the dictates of the particular case require from the standpoint of justice and from the standpoint of our constitutional tradition. The point of my remarks—and we can talk about the Canadian speech in detail, if you choose—was that it is really the great role of the judge to try to discover those standards that implement the intention of the framers.

The framers were very careful about the words they used. They were excellent draftsmen. They had drawn 11 constitutions for the separate states. This, they recognized, was a unique undertaking.

But the words of the Constitution must be the beginning of our inquiry.

Now, how far can you continue that inquiry away from the words of the text? Your question is whether or not there are unenumerated rights. To begin with, most of the inquiries that the Supreme Court has conducted in cases of this type have centered around the word "liberty." Now, the framers used that, what I call "spacious phrase," both in the fifth amendment, almost contemporaneous with the Constitution, and again in the 14th amendment they reiterated it.

The framers had an idea which is central to Western thought.

The CHAIRMAN. Western thought?

Judge KENNEDY. Thought. It is central to our American tradition. It is central to the idea of the rule of law. That is there is a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go.

Now, the great question in constitutional law is: One, where is that line drawn? And, two, what are the principles that you refer to in drawing that line?

The CHAIRMAN. But there is a line.

Judge KENNEDY. There is a line. It is wavering; it is amorphous; it is uncertain. But this is the judicial function.

The CHAIRMAN. It is not unlike, as I understand what you have said, one of your predecessors—if you are confirmed—discussing shared traditions and historic values of our people in making that judgment, and another of your predecessors suggesting that there is a right to be let alone, left alone.

Let me ask you, Judge Kennedy, Justice Harlan, one of the great true conservative Justices, in my view, of this century, had a similar concern; and as I understand it—correct me if I am wrong—expressed it not dissimilarly to what you are saying when he said no formula could serve as a substitute in this area for judgment and restraint, and that there were not any "mechanical yardsticks" or "mechanical answers."

Do you agree with the essence of what Justice Harlan was saying?

Judge KENNEDY. It is hard to disagree with that. That was the second Mr. Justice Harlan. Remember, though, Senator, that the object of our inquiry is to use history, the case law, and our understanding of the American constitutional tradition in order to determine the intention of the document broadly expressed.

One of the reasons why, in my view, the decisions of the Supreme Court of the United States have such great acceptance by the American people is because of the perception by the people that the Court is being faithful to a compact that was made 200 years ago. The framers sat down in a room for three months. They put aside politics; they put aside religion; they put aside personal differences. And they acted as statesmen to draw a magnificent document. The object of our inquiry is to see what that document means.

The CHAIRMAN. Judge, it will come as no surprise to you that one of the storm centers of our last debate and discussion was

whether or not there were unenumerated rights and whether the document was expansive.

Would you agree with Justice Harlan that, despite difficult questions in this area, the Court still has a clear responsibility to act to protect unenumerated rights, although where it draws that line depends on the particular Justice's view?

Judge KENNEDY. Yes, although I am not sure that he spoke in exactly those terms.

The CHAIRMAN. No, I am not quoting him.

Judge KENNEDY. I am not trying to quibble, but it may well be the better view, rather than talk in terms of unenumerated rights to recognize that we are simply talking about whether or not liberty extends to situations not previously addressed by the courts, to protections not previously announced by the courts.

The CHAIRMAN. Let us be more fundamental than that. There are certain rights that the courts over the years have concluded that Americans have either retained for themselves or have been granted that do not find specific reference in the Constitution—the right of privacy being one, as you pointed out in your speech, the right to travel.

So what we are talking about here, what I am attempting to talk about here and you are responding, is that whether or not in the case of the 14th amendment the word "liberty" encompasses a right that maybe heretofore has not been articulated by the court and does not find residence in some text in the Constitution, and whether or not the ninth amendment means anything.

Could you tell me what the ninth amendment means to you? And for the record, let me read it. I know you know it well. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Can you tell me what you think the framers meant by that?

Judge KENNEDY. I wish I had a complete answer. The ninth amendment has been a fascination to judges and to students of the Constitution for generations.

When Madison—and he was the principal draftsman of the Bill of Rights—wrote the Bill of Rights, he wanted to be very sure that his colleagues, the voters, and the world understood that he did not have the capacity to foresee every verbal formulation that was necessary for the protection of the individual. He was writing and presenting a proposal at a time when State constitutions were still being drafted, and he knew that some State constitutions, for instance the Virginia Bill of Rights went somewhat further than the Constitution of the United States.

In my view, one of his principal purposes, simply as a statesman, was to give assurance that this was not a proclamation of every right that should be among the rights of a free people.

Now, going beyond that, I think the sense of your question is: Does the ninth amendment have practical significance——

Senator THURMOND. Please keep your voice up so we can hear you.

Judge KENNEDY. Does the ninth amendment have practical significance in the ongoing determination of constitutional cases?

As you know, the Court has rarely found occasion to refer to it. It seems to me the Court is treating it as something of a reserve

clause, to be held in the event that the phrase "liberty" and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision.

The CHAIRMAN. Judge, I do not want to hurt your prospects any, but I happen to agree with you, and I find comfort in your acknowledgement that it had a purpose.

There are some who argue it has no purpose. Some suggest it was a water blot in the Constitution. But I read it as you do. It does not make either of us right, but it indicates that there is some agreement, and I think the historical text, and the debate surrounding the Constitution sustains the broad interpretation you have just applied.

And is it fair to say that in the debate about unenumerated rights, and the right of privacy in particular, that there is a question of crossing the line, acknowledging the existence of unenumerated rights, and the existence of the right of privacy? The real debate for the last 40 years has been on this side of the line, among those who sit on the bench and the Supreme Court, who acknowledge that there is, in fact, for example, a right to privacy, but argue vehemently as to how far that right extends.

Some believe that extends only to a right of privacy to married couples. Others would argue, and will argue, I assume at some point, that that right of privacy extends to consensual homosexual activity. But the debate has been on this side of the line, that is, as to how far the right extends, not if the right exists.

Do you have any doubt that there is a right of privacy? I am not asking you where you draw the line, but that it does exist and can be found, protected within the Constitution?

Judge KENNEDY. It seems to me that most Americans, most lawyers, most judges, believe that liberty includes protection of a value that we call privacy. Now, as we well know, that is hardly a self-defining term, and perhaps we will have more discussions about that.

The CHAIRMAN. Well, I would like to go back to that, if my colleagues have not covered it. I only have about 10 minutes under my own rules, and I would like to settle, if we can at the outset here, the question of whether or not any commitments were given, or were asked for.

In your questionnaire, you identified at least seven different sets of meetings, and a number of phone calls that you had with White House staff, or Justice Department personnel before you were actually nominated by the President.

Let me ask you this first. Since completing your questionnaire, have you recalled any other meetings, or conversations of any type, that have not already been identified, and that took place before your actual nomination?

Judge KENNEDY. No, I have not recalled any such additional instances.

The CHAIRMAN. To be absolutely clear, I am asking you here about direct communications of any type with the White House or Justice Department, as well as indirect communications such as through some third party or intermediary. That is, someone coming to you, asking your view, and that view being transmitted

through that person back to anyone connected with the Administration.

Judge KENNEDY. I understood that question in the sense that you describe when I answered the questionnaire, and I understand it that way now. The conversations that I described were the only conversations that occurred.

The CHAIRMAN. Judge, I appreciate your cooperating in this matter, but I hope you understand why it is important.

Let's look at, if you will, the October 28th meeting that you identified. According to your questionnaire, that meeting was attended by Howard Baker, Kenneth Duberstein, A. B. Culvahouse, Mr. Meese, and Assistant Attorney General William Bradford Reynolds.

Were you asked at that meeting how you would rule on any legal issue?

Judge KENNEDY. I was not; I was asked no question which came even close to the zone of what I would consider infringing on judicial independence. I was asked no question which even came close to the zone of what I would consider improper. I was asked no question which came even close to the zone of eliciting a volunteered comment from me as to how I would rule on any particular case, or on any pending issue.

The CHAIRMAN. Judge, were you asked about your personal opinion on any controversial issue?

Judge KENNEDY. I was not.

The CHAIRMAN. Did anyone ask you what, as a personal matter, you thought of any issue or case?

Judge KENNEDY. No such questions were asked, and I volunteered no such comments.

The CHAIRMAN. And were you asked anything about cases currently before the Court?

Judge KENNEDY. No, sir.

The CHAIRMAN. I realize there is some redundancy in those questions, but is important, again, for the record.

Now, Judge, there was—if I can move to the end here—there was some newspaper comment about a meeting that took place after you had been nominated.

Let me ask you the question. Did you meet with any sitting United States Senators prior to your being nominated by the President?

Judge KENNEDY. No.

The CHAIRMAN. Now let me turn to that period, now, after the nomination.

Judge KENNEDY. Now let's be precise, however. I think the nomination was sent to the Senate some weeks after it was announced.

The CHAIRMAN. I beg your pardon. From the time the President had announced his intention——

Judge KENNEDY. At the time I had already met with you and a number of Senators, but if the demarcation in your question is as to the time the President made the announcement in the White House——

The CHAIRMAN. That is what I mean.

Judge KENNEDY. The answer is no, I had not met with any United States Senators prior to that time.

The CHAIRMAN. Now I would like to speak with you about the same issues, subsequent to the President standing with you and announcing to all of the world that you were going to be his nominee.

Have you made any commitments or promises to anyone in order to obtain their support for your nomination?

Judge KENNEDY. I have not done so, and I would consider it highly improper to do so.

The CHAIRMAN. So just to make the record clear, you made no promise to any Member of the Senate on anything?

Judge KENNEDY. Other than that I would be frank and candid in my answers.

The CHAIRMAN. Judge, I am not doubting you for a minute. As I am sure you are aware, though, one of my colleagues is reported to have spoken with you about the issue of abortion on November the 12th at a meeting at the White House.

Let me read to you—and I am sure you have seen the text—from a newspaper article by a columnist named Cal Thomas. And Mr. Thomas says the following happened. I am quoting from his article.

> Republican Senator Jesse Helms of North Carolina told me that he and Judge Kennedy met in a private room at the White House on November the 12th.

Then a quote within a quote.

> "I think you know where I stand on abortion," Mr. Helms said to Judge Kennedy. Judge Kennedy smiled and answered, "Indeed I do, and I admire it. I am a practicing Catholic."

The article then goes on to say:

> Judge Kennedy did not elaborate, but Mr. Helms interpreted the response to mean that Judge Kennedy is opposed to abortion and would look favorably on any case in which the Court's earlier decisions striking down the abortion laws of all 50 States might be overturned.

A bit later in the column, Mr. Thomas continued:

> "I am certain as I can be," said Mr. Helms, "without having heard him say I shall vote to reverse *Roe* v. *Wade*—which of course he wasn't going to say—on what he called this 'privacy garbage'—recent Supreme Court decisions involving not only abortion but civil rights, protections for homosexuals—Mr. Helms indicated a certain collegiality with what he believes to be Judge Kennedy's views."

Ultimately though, said, Mr. Helms, quote, "Who knows?," but, quote, "That's where we are with any of the nominees." End of quote. End of column.

Could you, for the record, characterize for us how accurate or inaccurate you think that column is.

Judge KENNEDY. I have not seen that column, but I have absorbed it from what you have said, Senator.

To begin with, I think it is important to say that if I had an undisclosed intention, or a fixed view on a particular case, an absolutely concluded position on a particular case or a particular issue, perhaps I might be obligated to disclose that to you.

I do not have any such views with reference to privacy, or abortion, or the other subjects there mentioned, and therefore, I was not attempting, and would not attempt to try to signal, by inference, or by indirection, my views on those subjects.

The conversation that you referred to was wide-ranging, and of a personal nature. The Senator asked me about my family and my

character, and I told him, as I have told others of you, that I admire anyone with strong moral beliefs.

Now it would be highly improper for a judge to allow his, or her, own personal or religious views to enter into a decision respecting a constitutional matter. There are many books that I will not read, that I do not let, or these days do not recommend, my children read. That does not prohibit me from enforcing the first amendment because those books are protected by the first amendment.

A man's, or a woman's, relation to his, or her, God, and the fact that he, or she, may think they are held accountable to a higher power, may be important evidence of a person's character and temperament. It is irrelevant to his, or her, judicial authority. When we decide cases we put such matters aside, and as—I think it was—Daniel Webster said, "Submit to the judgment of the nation as a whole."

The CHAIRMAN. So Judge, when you said—if it is correct—to Senator Helms: "Indeed I do, and I admire it, I am a practicing Catholic," you were not taking, at that point a position on the constitutional question that has been and continues to be before the Court?

Judge KENNEDY. To begin with, that was not the statement.

The CHAIRMAN. Will you tell us what——

Judge KENNEDY. We had a wide-ranging discussion and those two matters were not linked.

The CHAIRMAN. Those two matters were not linked. So the article is incorrect?

Judge KENNEDY. In my view, yes.

The CHAIRMAN. That is fine. I thank you. My time is up. I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Kennedy, a fundamental principle of American judicial review is respect for precedent, for the doctrine of stare decisis. This doctrine promoted certainty in the administration of the law, yet at least over 180 times in its history, the Supreme Court has overruled one or more of its precedents, and more than half of these overruling opinions have been issued in the last 37 years.

Judge Kennedy, would you tell the committee what factors you believe attribute to this increase in overruling previous opinions.

Judge KENNEDY. That is a far-ranging question, Senator, which would be an excellent law review article, but let me suggest a few factors.

First, there is a statistical way to fend off your question, by pointing out that the Supreme Court hears many more cases now than it formerly did. You will recall, in the early days of the Republic, when some cases were argued for days.

The CHAIRMAN. He may be the only one able to recall the early days of the Republic, here, on the committee. [Laughter.]

Judge KENNEDY. I was using "you" in the institutional sense, Senator. And that has changed.

Secondly, the Court has taken many more public-law cases on its docket.

And thirdly, there are simply many, many more precedents for the Court to deal with, and so the adjustment, the policing, the shaping of the contours of our law simply require more over ruling, as a statistical matter.

That does seem, though, to be not quite a complete answer to your question, because your question invites at least exploration of the idea whether or not the Supreme Court has changed its own role, or its own view of, its role in the system, or has changed the substantive law, and it has.

In the last 37 years, the Supreme Court has followed the doctrine of incorporation by reference, so that under the Due Process Clause of the 14th amendment, most of the specific provisions of the first eight amendments have been made applicable to the States, including search and seizure, self-incrimination, double jeopardy, and confrontation. Many of these cases, many of these decisions, involved overruling. So there was a substantive change of doctrine that did cause an increase in the number of overruled cases, Senator.

Senator THURMOND. Incidentally, Judge, if I propound any question that you feel would infringe upon the theory that you should not answer questions in case it might come before the Supreme Court, just speak out, because I do not want you to feel obligated to answer if I do.

Judge KENNEDY. Thank you very much, Senator.

Senator THURMOND. Judge Kennedy, we have recently celebrated the 200th anniversary of the Constitution of the United States.

Many Americans expressed their views about the reason for the amazing endurance of this great document. Would you please share with the committee your opinion as to the success of our Constitution, and its accomplishment of being the oldest existing Constitution in the world today.

Judge KENNEDY. Well, the reasons for its survival, and its success, Senator, are many fold. The first is the skill with which it was written. Few times in history have men sat down to control their own destiny before a government took power; in the age of Pericles, and in the Roman empire, just before Augustus, and again, in 1789. The framers wrote with great skill, and that is one reason for the survival of the Constitution, for the survival of the Constitution despite a horrible civil war, a war arguably, and I think probably, necessary to cure a defect in the Constitution.

Then there is the respect that the American people have for the rule of law. We have a remarkable degree of compliance with the law in this country, because of the respect that the people have for the Constitution and for the men who wrote it.

My third suggestion for why there has been a great success in the American constitutional experience is the respect that each branch of the government shows to the other. This is a vital part of our constitutional tradition. It has remained true since the founding of the Republic.

Senator THURMOND. I had a question on the ninth amendment, but you have already been asked about that.

Judge Kennedy, under the Constitution, powers not delegated to the federal government are reserved to the States, and to the people.

Would you describe, in a general way, your view of the proper relationship between the federal and State law.

Judge KENNEDY. The framers thought of the States as really a check-and-balance mechanism, operating, obviously, not on the national level.

The idea of preserving the independence, the sovereignty, and the existence of the separate States was of course critical to the Constitution, and it remains critical.

Now there are very few automatic mechanisms in the Constitution to protect the States. If you read through the Constitution you will see very little about the rights and prerogatives of the States.

At one time, as you all well know, United States Senators were chosen by State legislatures, which gave the States an institutional control over the national government. That has long since disappeared, and I am sure no one argues for its return.

But that was one of the few automatic mechanisms for the States to protect themselves. The Congress of the United States is charged, in my view, with the principal duty of preserving the independence of the States, and it can do so in many ways; in the way that it designs its conditional grant-in-aid bills, in the ways that it passes its statutes.

The courts, too, have a role, and the courts have devised some very important doctrines to protect federalism. The idea of abstention in *Younger* v. *Harris*, the Erie rule, the independent State ground rule, have all been designed by the courts out of respect for the States.

But in my view, this is the job of every branch of the government.

Senator THURMOND. Are you of the opinion that our forefathers had in mind, as I understand it, that the federal government, the central government, the national government, was simply to be a government of limited powers?

Judge KENNEDY. It is very clear that that was the design of the Constitution.

Senator THURMOND. I am glad to hear you say that, and I wish more people in this country would recognize that. I see you are a good student of the Constitution.

Judge KENNEDY. Well, I am glad you give me a good mark, Senator.

Senator THURMOND. Judge Kennedy, the Supreme Court's decision in *Marbury* v. *Madison* is viewed as a basis of the Supreme Court's authority to interpret the Constitution, and issue decisions which are binding on both the executive and legislative branches.

Would you please give the committee your views on this authority.

Judge KENNEDY. *Marbury* v. *Madison* is one of the essential structural elements of the Constitution of the United States. As we all know, the doctrine of judicial review is not explicit in the Constitution. I have very little trouble finding that it was intended. Federalist Number 78 makes that rather clear, and I think that this vital role is one of the critical structural elements of the Constitution, and that it is essential to the maintenance of constitutional rule.

Senator THURMOND. Judge Kennedy, would you please tell us your general view of the role of antitrust today, including those

antitrust issues which you believe most seriously affect competition and the consumer.

Judge KENNEDY. I am not a student of the antitrust law. I try to become one whenever I have an antitrust opinion.

This is an area which is one of statutory law, and it is an interesting one because the Congress of the United States has essentially delegated to the courts the duties of devising those doctrines which are designed to insure competition.

I have no quarrel with the Congress doing that, because if the courts do not perform adequately, if they do not follow the intent of Congress, there is always a corrective. And I think it is somewhat reassuring that the judiciary has performed well under the antitrust laws.

The particular elements that are necessary to preserve competition are of course vigorous enforcement of the law against illegal practices, particularly price fixing, and other prohibited practices.

Senator THURMOND. Judge, do you believe the Court has given sufficient consideration to a relevant economic analysis in evaluating the effects of restraints of trade, and are you satisfied with the guidance that the Court has provided on the proper role of economic analysis in antitrust laws?

Judge KENNEDY. An important function of the courts, Senator, is to serve as interpreters of expert opinions, and the courts of the United States have received economic testimony, have studied economic doctrine, and have formed these into a series of rules to protect competition.

Now economists, like so many others of us, have great disagreements, and we have found—for instance—that economic testimony tells us that some vertical restrictions are actually pro competitive, and the courts have accepted this economic testimony.

And I think the courts, all in all, have done a good job of articulating their reasoning in antitrust cases, and identifying when they are relying on economic reasoning. Sometimes that reasoning is wrong, but at least it is identified.

Senator THURMOND. Judge Kennedy, recent Supreme Court decisions, such as *Illinois Brick, Monfort,* and *Associated General Contractors,* have, for different reasons, restricted standing to bring private antitrust suits.

Generally, what is your view of these decisions, and how do you assess their impact on access to the courts by private parties?

Judge KENNEDY. Well, the Court has struggled to draw the appropriate line for determining who may recover and who may not recover in an antitrust case. As we know, if there is an antitrust violation it has ripple consequences all the way through the system.

Antitrust cases are ones in which triple damages are recoverable, and therefore, the courts have undertaken to draw a line to allow only those who are primarily injured to recover.

Not only is this, it seems to me, necessary simply as a matter of enforcing the antitrust laws, but it reflects, too, the underlying value of federalism, because to the extent to which federal antitrust laws apply, State laws are displaced.

Where that line should be, how successful the *Illinois Brick* doctrine has been in terms of promoting competition, and permitting,

at the same time, antitrust plaintiffs to sue when necessary, is a point on which I have not made up my mind.

Senator THURMOND. Judge Kennedy, there has been much publicity and debate recently about corporate takeovers. What is your general view about the antitrust implications of these takeovers, and how do you view State efforts to limit takeovers?

Judge KENNEDY. The Supreme Court has recently issued a decision in which it approves of State statutes which attempts to regulate takeovers.

This is a tremendously complex area. It is highly important because business corporations throughout the United States have a fixed-capital investment, and a fixed investment in human resources. They have managers, they have skilled workers, and it is important that they be given protection.

Now it seems to me that the States might make a very important contribution in this complex area.

Senator THURMOND. Judge Kennedy, some of your opinions involve application of the per se rule of liability. Generally, when do you believe it is appropriate to apply the per se rule in antitrust cases, and when would you apply the rule of reason?

Judge KENNEDY. As to the specific instances, I cannot be particularly helpful to you, Senator. Let me see if I can express what I think are the considerations that the Court should address.

There is a continuum here, or a balance. On the one hand, there is a rule of reason, and this involves something of a global judgment in a global lawsuit. A rule of reason antitrust suit is very expensive to try. And once it is tried, it is somewhat difficult to receive much guidance from the decision for the next case.

Per se rules, on the other hand, are precise. They are automatic, in many cases, as their name indicates. The problem with per se rules is that they may not always reflect the true competitive forces.

The Supreme Court has to make some kind of adjustment between these two polar concepts, and it has taken cases on its docket in order to do this.

Senator THURMOND. Judge Kennedy, recently, there has been some discussion in regards to raising the amount in controversy requirement in diversity cases. If the amount is raised, it should reduce the current civil caseload in the federal courts.

Would you please give the committee your opinion on this matter.

Judge KENNEDY. On diversity jurisdiction, generally—I may be drummed out of the judges' guild—but I am not in favor of a total abolition of diversity jurisdiction. I have tried cases in the federal courts, and I realize their importance.

On the other hand, we simply must recognize that the federal courts' time is extremely precious. The Congress of the United States has vitally important goals that it wants enforced by the federal courts.

Rather than looking at jurisdictional limits, which can be avoided, and which are the subject of further controversy as to whether or not they have been adequately pleaded, it seems to me that perhaps Congress should look at certain types of cases which could be excluded from the diversity jurisdiction, say, auto-accident cases.

It seems to me that that is a better approach, generally.

Senator THURMOND. That question really involved a decision by Congress, but I just thought maybe your opinion would be helpful.

Judge KENNEDY. Well, it is somewhat tempting, with diversity jurisdiction, to think that we could take a byzantine area of the law, and simply make it irrelevant by abolishing the jurisdiction. Many lawyers, many judges, would think Congress had done them a great favor if they made that whole branch of our learning simply irrelevant.

On the other hand, I think the commitment to diversity jurisdiction, both in the Constitution and in many segments of the bar, is sufficiently strong so that the better approach is to find a class of cases that we can eliminate from the jurisdiction, rather than abolishing it altogether.

Senator THURMOND. Judge Kennedy, 20 years have passed since the *Miranda* v. *Arizona* decision which defined the parameters of police conduct for interrogating suspects in custody.

Since this decision, the Supreme Court has limited the scope of *Miranda* violations in some cases.

Do you feel that the efforts and comments of top law-enforcement officers throughout the country have had any effect on the Court's views, and what is your general view concerning the warnings this decision requires?

Judge KENNEDY. I cannot point to page and verse to show that the comments of law-enforcement officials have had a specific influence, but it seems to me that they should. The Court must recognize that these rules are preventative rules imposed by the Court in order to enforce constitutional guarantees; and that they have a pragmatic purpose; and if the rules are not working they should be changed.

And for this reason, the Court should pay close attention to the consequences of what it has wrought. Certainly comments of law-enforcement officials, taken in the proper judicial context, it seems to me, are relevant to that judgment.

Senator THURMOND. What did you say? Are relevant?

Judge KENNEDY. Are relevant.

Senator THURMOND. Thank you. Judge Kennedy, there are hundreds of inmates under death sentences across the country. Many have been on death row for several years as a result of the endless appeals process.

Would you please tell the committee your opinion of placing some limitation on the extensive number of post-trial appeals that allow inmates under death sentences to avoid execution for years after the commission of their crimes.

Judge KENNEDY. As to the specifics of a proposal, of course I could not and would not pass on it. It is true that when we have an execution which is imminent, say, 30 days, the courts, particularly at the appellate level, begin undergoing feverish activity, activity which is quite inconsistent with their usual orderly, mature, deliberate way of proceeding.

We are up past midnight with our clerks, grabbing books off the wall, and phoning for more information, where a man's life—it is usually a man—is hanging in the balance. And this does foster not a good perception of the judiciary. It is a feverish kind of activity

that is not really in keeping with what should be a very deliberate and ordered process.

Justice O'Connor who is the Circuit Justice for the Ninth Circuit is concerned about this. She has asked the Ninth Circuit to draft some procedures in order to make this a more orderly process. Any guidance that the Congress of the United States could give would, I think, be an important contribution to the administration of justice.

I really do not know how you are going to avoid it, but it is something that we should give attention to.

Senator THURMOND. Judge Kennedy, in the last several decades, we have seen a steady increase in the number of regulatory agencies which decide a variety of administrative cases.

I realize that the scope of judicial review of these administrative cases varies from statute to statute. However, as a general rule, do you believe that there is adequate opportunity today for the appeal of administrative decisions to the federal courts, and do you believe that the standard of review for such appeals is appropriate?

Judge KENNEDY. Generally, the answer to that question is yes. As I have indicated before, I think the courts play a very vital function by taking the expert, highly detailed, highly complex findings of an agency, and recasting them in terms that the courts themselves, the litigants, and the public at large, can understand. While with reference to particular agencies there may be areas for improvement by statute, I think generally the system of administrative review is working well.

Senator THURMOND. Judge Kennedy, in the past several decades, the caseload of the Supreme Court has grown rapidly, as our laws have become far more numerous and complex.

In an effort to reduce the pressures on the Supreme Court, an inter-circuit panel was proposed to assist the Court in deciding cases which involve a conflict among the judicial circuits.

In the 99th Congress, the Judiciary Committee approved such a panel on a trial basis. Similar legislation has been introduced in the 100th Congress. As you may know, former Chief Justice Warren Burger has been a strong advocate of this panel, along with many other current members of the Court.

Would you please give the committee your general thoughts on the current caseload of the Court, and the need for an inter-circuit panel.

Judge KENNEDY. Well, I hope, Senator, that some months from now I will have a chance to take a look at that firsthand. But it seems to me from the standpoint of a circuit judge that there are some problems with that proposal.

Circuit judges, I think, work under an important constraint when they know that they are writing for review by the Supreme Court of the United States, and not by some of their colleagues.

Furthermore, if you had a national court of appeals, it would not simply resolve particular issues; it would have its own case law, which would have its own conflicts.

And I am concerned about that.

Further, as I understand the statistics, this would save the Supreme Court about 35 cases a year, maybe 50. In all of those cases, the circuit courts have already expressed their views, and so the

Supreme Court has a very good perspective of what choices there are to make.

If those 50 cases were taken away, the nature of the docket of the Supreme Court might change. The Supreme Court might hear all public law cases in which the juridical philosophies that obtain on the court would divide them in more cases.

It seems to me somewhat healthy for the Supreme Court to find something that it can agree on.

Senator THURMOND. Judge Kennedy——

Judge KENNEDY. And incidentally, this was a suggestion made by Arthur Hellman in a very perceptive law review article that I read a few years ago.

Senator THURMOND. Judge Kennedy, at present, federal judges serve during good behavior, which in effect is life tenure.

Federal judges decide when they retire, and when they are able to continue to serve. Congress, in the Judicial Councils Reform and Conduct and Disability Act of 1980 provided some limited ability for the judicial council of the circuits to act with respect to judges who are no longer able to serve adequately because of age, disability, or the like.

The Supreme Court is not covered by this act. Judge Kennedy, do you feel the Supreme Court should be covered by the Judicial Conduct and Disability Act?

And would you give the committee your opinion on the need to establish by constitutional amendment a mandatory retirement age for judges and justices?

Judge KENNEDY. Well, Senator, in the past few weeks, most of my thoughts have been on how to get on the Supreme Court, not how to get off it.

But my views are that I would view with some disfavor either of those proposals. The Supreme Court is sufficiently small, sufficiently collegial, sufficiently visible, that I think if a member of the court is incapable of carrying his or her workload, there are enough pressures already to resign.

History has been very kind to us in this regard.

Senator THURMOND. So far as I am concerned, it is not age but it is health that counts.

Judge KENNEDY. I am with you, Senator.

Senator THURMOND. Judge Kennedy, and this is the last question, there have been complaints by federal judges regarding the poor quality of advocacy before the nation's courts, including advocacy before the Supreme Court.

Do you feel that legal representation is not adequate? And if so, what in your opinion should be done to improve the quality of this representation?

Judge KENNEDY. The repeat players in the legal system—insurance companies, in some cases public interest lawyers—are very, very good.

The person that has one brush with the legal system is at risk. I wish I could tell the committee that most of the arguments I hear on the court of appeals, and we come from a great and respected circuit, are fine and brilliant and professional arguments. They are not.

You gentlemen are the experts on what to do. I think we have to attack it at every level, in the law schools, with Inns of Court, with judges participating with the bar, and with an insistence that the highest standards of advocacy pertain in the federal courts.

It is a problem that persists. And it is a problem that should be addressed.

We had in the ninth circuit a committee study for 4 years on whether or not we should impose standards on the attorneys that practice in the federal courts of the ninth circuit. We finally came up with a proposal that they had to certify that they had read the rules. And it was turned down. So judges, as well as attorneys, must be more attentive to this problem.

Senator THURMOND. Judge, I want to thank you for your responses to the questions I have propounded, and I think they indicate that you are well qualified to be an Associate Justice of the Supreme Court.

Judge KENNEDY. Thank you, sir.

The CHAIRMAN. Judge, before I yield to Senator Kennedy, I want to set the record straight.

It has been called to my attention that I may have left the implication that on November the 12th you met with only one Senator, when in fact you met with about 10 Senators.

I was referring to a single conversation.

Judge KENNEDY. I was handed a note to that effect. And I did not understand your question that way. But it is true that I met with a number of your colleagues.

The CHAIRMAN. I didn't think it was that confusing, either. I am glad you didn't. But obviously, our staffs did. So now we have cleared up what wasn't confusing before.

And one last comment that I will make. I was at the White House with the President on one occasion with the Senator from South Carolina. And the President was urging me to move swiftly on a matter.

And he said to me, he said, Joe, when you get to be my age, you want things to hurry up. Senator Thurmond looked at him and said, Mr. President, when you get to be my age, you know it does not matter that much. [Laughter.]

I will yield to the Senator from——

Senator THURMOND. Mr. Chairman, I just want to say, experience brings wisdom. And as time goes by, I'm sure you will realize this is the case. [Laughter.]

The CHAIRMAN. I realize it now. That is why I follow you, boss. I yield to the Senator from Massachusetts.

Senator KENNEDY. Thank you very much.

Mr. Chairman, when I had the good opportunity, like other members of the committee, to meet with the nominee, I showed him in my office the seal of the name Kennedy in Gaelic.

And the name Kennedy in Gaelic means helmet. And I wondered whether the nominee was going to bring a helmet to these particular hearings. But I am not sure we are playing tackle. Maybe perhaps touch football.

But nonetheless, I do not know whether he is prepared to say whether he is really enjoying these hearings, like some mentioned earlier or not.

Judge KENNEDY. I will put on a helmet when you do, Senator. [Laughter.]

Senator KENNEDY. As I mentioned during the course of our exchange, we talked about the issues of civil rights and the progress that had been made in this country in the period of the last 25 years.

And I think it has been extraordinary progress. You have referred to it in a peripheral way in response to some of the earlier questions, but it has been progress which I think some of the American people have been proud of.

It has been progress which Republican and Democratic presidents have contributed to, and for which there's been strong bipartisan support in the House of Representatives and the Senate of the United States.

The role of the courts, both in interpreting and in enforcing this progress, has been important and virtually indispensable. That is certainly something that you have recognized in ensuring that we are going to get a fair interpretation of the laws, and that the laws are going to be vigorously enforced.

You made a number of speeches, but one of the ones that I find extremely eloquent was one you made in 1978, when you were talking about the independence of the federal judiciary.

And you said, and I quote:

> It was not the political branches of the government that decided *Brown* v. *Board of Education*. It was not the political branches of the government that wrought the resolution of *Baker* v. *Carr*, the apportionment decision, or that decided the right of counsel case in *Gideon* v. *Wainwright*. It was the courts.

And I submit that if the courts were not independent, those decisions might not have been made, or if made, might not properly have been enforced.

Some of the opinions you have written, Judge, do not seem to reflect that same sensitivity, and I would like to review some of those cases with you at this time.

The first area is fair housing. I think as you probably know the discrimination in housing is one of the most flagrant forms of discrimination, because it perpetuates the isolation and the ignorance that are at the roots of prejudice.

In 1985, the Department of Housing and Urban Development reported there are 2 million incidents of race discrimination in housing each year. In fact, a black family looking for rental housing stands over a 70 percent chance of being a victim of discrimination.

Your opinion in the *Circle Realty* case in 1976 raises a question about how you interpret the anti-discrimination laws in housing.

And in that case, the citizens had claimed that their communities were segregated as a result of racial steering by real estate brokers, that is, blacks were steered to black neighborhoods and whites were steered to white neighborhoods.

You ruled that those citizens did not even have standing to raise their claim of discrimination under a key provision of the Act because they were only testers, and they were testing the brokers to see if they were actually steering clients in this discriminatory way.

You threw them out of court because they weren't actually trying to rent or to buy a house. In 1978, the Supreme Court ruled

7 to 2, in an opinion by Justice Powell, that your interpretation of the law was wrong, and that the testers did have a right to go to federal court to remedy this blatant form of racial discrimination in housing.

My question is this; How do you respond to the concern that your opinion reflects a narrow approach to the civil rights laws as the Supreme Court has interpreted those laws?

Judge KENNEDY. Well, Senator, at the outset, it is entirely proper, of course, for you to seek assurance that a nominee to the Supreme Court of the United States is sensitive to civil rights.

We simply do not have any real freedom if we have discrimination based on race, sex, religion or national origin, and I share that commitment.

Now, in the particular case, what occurred was, plaintiffs who themselves were not homebuyers went to real estate agents and were turned down allegedly because of their color, or were not turned down but were shown a black community if they were black or to a white community if they were white.

This is, of course, of critical concern because brokers are a small channel in the stream of housing sales. And if there is discrimination at that point, that is a good point to attack it.

Now in a sense, I think it is incorrect, Senator, to say that I threw them out of court. There were two provisions in the law.

One provision provided for immediate redress from a court of law. Another provision, which I believe was Section 810, required that the plaintiffs must go first to the agency responsible for enforcement of anti-discrimination in housing laws.

Because there were some unresolved questions as to standing at the time of this litigation, we thought that Congress, in its scheme, had made a distinction based on the degree of injury that the particular plaintiff had shown.

We found no other way to explain the difference in the two sections. And we indicated in the opinion that administrative remedies may be superior in some cases to judicial remedies.

The lesson of the Voting Rights Act cases, and the Voting Rights Act statutes, is that courts can be very inefficient. One of the great lessons for courts taught by the Voting Rights Act statutes is that there are remedies other than courts if civil rights are being deprived.

We thought this was a creative, important, helpful statement of what Congress had in mind. The Supreme Court said we were wrong, and I certainly have no quarrel with the decision. I was puzzled by the statute. And so far as the Supreme Court's decision is concerned, I would willingly and fully enforce it.

Senator KENNEDY. I do not think you will get any argument, at least from Senator Specter and myself, with regards to using administrative remedies.

We have legislation that is cosponsored now by some 38 Senators to try to strengthen these administrative remedies. You point out that there are two possible remedies in this particular legislation, one that involved running through an administrative procedure and then being able to go to the courts; and another in which one could go directly to the courts.

My question is: how do you respond to the concern as to whether you were using a rather narrow, cramped, interpretation of that legislation, in an area where there is a good deal of discrimination in our society? And what kind of assurance can you give to people that are concerned about this, that you have a real sensitivity to the type of problem that at least the existing legislation was focused on?

Judge KENNEDY. Yes. You are entitled to that assurance. And I have the greatest respect for the lead that the Congress has taken in this area.

We had thought that this was really the appropriate way to explain why the two sections were different. In that respect, we thought we were being faithful to the drafting of the statute and the structure of the statute.

It is true, of course, that these laws must be generously enforced, or people are going to get hurt.

Senator KENNEDY. The reason I raise this, Judge, is because both the Supreme Court had reached a different decision than you had, and the four other cases that finally were decided by other courts had also reached a different decision than you had.

And to get your assurances about this issue, I think, is important.

Let me go to another area, and that dealt with the *Mountain View-Los Altos Union High School* case. As the Judge knows, we indicated to you prior to today that we were going to explore various decisions with you, and named the particular cases.

In recent years, Congress and the States have taken steps to protect the civil rights of handicapped persons. And we have much more to do to ensure that the disabled are not isolated, and can participate to the full extent possible in our society.

In our efforts to reach that goal, Congress enacted the Education for All Handicapped Children Act in 1975. The Act gives handicapped children the right to education, either in public schools if possible, or in private schools if necessary; and federal funds are made available to defray the cost.

Now, in the *Mountain View-Los Altos Union High School* case in 1983, you read the statute narrowly and held that parents who transferred their handicapped child to a private school, while an administrative proceeding was pending, were not entitled to reimbursement for tuition expenses.

And once again, the Supreme Court took a different view; and in a unanimous opinion by Justice Rehnquist, the Court read the statute broadly, holding that the parents were entitled to reimbursement. Justice Rehnquist recognized that Congress did not intend to put parents to the choice of losing their rights under the Act or doing what they think is best for the educational needs of their child.

So my question here again is, what can you tell the members of the committee to give us confidence that you will not take a crabbed and narrow view in construing these extremely vitally important and significant statutes?

Judge KENNEDY. This was a vitally important case. I reviewed it only last night, and didn't have the record in front of me. But I recall the case.

It was unfortunately an all too typical case in which a young man had emotional problems. He found it very difficult to adjust to school.

And his mother was distraught, not only over how her child was developing, but over the battle she had to have with the administrative agency to get him special care.

The question was whether or not, if the school disagreed with the mother initially and said, no, we will not pay for the special care, whether the school, after the administrative agency had ruled in favor of the mother, had to pay for the cost of the special instruction in the interim.

We thought that the normal administrative remedies rule and exhaustion rule were written into the statute. There was a so-called stay-put provision in the statute, which we thought required the parent to leave the child in the hands of the school authorities if the school authorities did not agree with the parent; and in many cases, school authorities agree with the parent. In many cases, there is an agreement, and they immediately send the child.

The fourth, the seventh and the eighth circuits agreed with us. The first did not and the Supreme Court unanimously did not.

I have seen the necessity for spending more money in the schools on education across the board. And we were being asked in this case to say that a local school district, an entity of the State, was required to pay this sum.

We thought a question of federalism was involved, in that school districts are strapped for every penny.

It is true that the Congress of the United States had a policy in favor of supporting education for these disturbed children, and of course that should be given full and vigorous enforcement.

I have absolutely no problem with the Supreme Court's decision. It said that exhaustion of administrative remedies was not necessary.

The Court also made another very important statement. We had said that these are damages against the State. And the Supreme Court of the United States said, well, these are not damages. These are simply payments that the State had to make all along, and the State is really not injured. I fully accept and endorse the reasoning in that case, Senator.

Senator KENNEDY. It was really the reimbursement of the tuition, was it not?

Judge KENNEDY. Well, of the cost of the special school, yes, sir.

Senator KENNEDY. But again, the question is: Congress developed that legislation to try and deal with the need for the handicapped and disabled children to get an education; the question is whether you are going to interpret this Act in what I would have considered as both the spirit and the letter of the law—a sense of generosity, or whether it would be in a more reshaped way.

And that is really what we are trying——

Judge KENNEDY. I do not think those statutes should be interpreted grudgingly. There is a certain amount of finger pointing that goes on here where the courts say the Congress did not write the statute clearly enough, and more or less saddles Congress with the duty of cleaning up the language. I have come to recognize that

the workload of the Congress is such that we have to interpret the statutes as they are given to us.

Senator KENNEDY. Well, I think as you know from the process, as a result of being a political institution we some how lack the kind of precision that a court might want.

Again, it seems that this particular issue, given the fact where the Supreme Court came out on this with a unanimous decision, it was appropriate to raise and have your comments today.

Let me move to another area, Judge Kennedy. And this is with regards to the memberships in various clubs. You are familiar with this issue.

As you know, in 1984, the American Bar Association amended the commentary to its Code of Judicial Conduct to provide, and I quote: "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."

It would seem from your questionnaire that you belonged to three clubs that discriminated against women, and that one or more of these clubs may have discriminated against racial minorities as well.

As I understand it, the Olympic Club is a country club in San Francisco which also has a downtown athletic facility with meeting rooms, dining, and residential facilities. And it has about 4,000 members.

And when you joined the Olympic Club in 1962, its membership was expressly limited to white males. And apparently, that explicit restriction on racial minorities was lifted in 1968.

Today there are still, as I understand, no active black members of the club, and women can still not be full members of the club.

You were a member of the Olympic Club for many years before you became a federal judge. You continued to be a member of the club for 12 years after you became a federal judge, even though it discriminated against blacks and women.

Now in June of 1987, the San Francisco City Attorney warned the Olympic Club that its discriminatory practices violated the California civil rights laws So the issue was becoming a public controversy.

At this time you first expressed concern about the club's restrictive membership policy. And in August you wrote to the Olympic Club to express those concerns, and you resigned from the Olympic Club in late October, when you were under consideration for nomination to the Supreme Court, and after the membership of the Olympic Club had voted against the board of directors' proposal to amend the bylaws of the club to encourage the sponsorship of qualified women and minority candidates.

So Judge Kennedy you apparently didn't try to change the discriminatory policies of the Olympic Club until this summer, and you didn't resign until your name had evidently surfaced on the short list of potential nominees.

My question is a simple one. Why did it take so long?

Judge KENNEDY. Discrimination comes from several sources. Sometimes it is active hostility. And sometimes it is just insensitivity and indifference.

Over the years, I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and of minorities in society. This was an issue on which I was continuing to educate myself.

I want to see a society in which young women who are professionals have the same opportunity as I did to join a club where they meet other professionals. I would like that opportunity for my daughter if she were a practicing lawyer or in the business world.

With reference to the Olympic Club, in part it has the atmosphere of a YMCA with its downtown facilities reserved for me. I used it and enjoyed it and found it helpful.

In the late spring of 1987, this year, the U.S. Open was sponsored at the Olympic Club. At that time publicity surfaced that it did not have some racial minorities as members.

That was not a policy of the club, as I understood it, but it was pretty clear that the mix was not there if you looked at the membership rolls. The club expressly excluded women.

There was an article in the New Yorker magazine which really triggered my action. A very fine sports writer wrote about the Open and talked about the egalitarian history of the club.

I wrote a letter to the club, which the committee has, in which I indicated that it was time to make the egalitarian spirit a reality.

I had discussions with the legal counsel for the club. I knew no directors of the club or officers. I indicated that in my view it was high time that the Olympic Club changed.

They did have a membership meeting, as you've indicated, in part as a result of my discussions, but in part as a result of the action of the city attorney, and concerns expressed by other members.

I actually had heard that the bylaw that you referred to had passed. The board of directors were optimistic that it would, and somebody actually reported back to me that it had passed. I was not a voting member and cannot vote and was not at the meeting.

When I heard that the bylaw had been turned down, principally the objection was women in the athletic facility, not racial minorities.

I thought that my position had become quite untenable. I therefore resigned before I talked to the members of the Administration, thinking that it was not fair either to the Administration or the Members of this distinguished body to make that an issue.

Senator KENNEDY. This is also a club where professionals gather, and have some business associations or meetings or entertainment?

Judge KENNEDY. No question about it. It is downtown. It is a luncheon club.

Senator KENNEDY. I think you probably answered the point that I am getting at, but let me just back up and see if you have responded to it.

In the questionnaire, when you were asked about your definition of invidious discrimination, you wrote, I quote:

> Invidious discrimination suggests that the exclusion of a particular individual on the basis of their sex, race, or religion or nationality is intended to impose a stigma upon such persons. As far as I am aware, none of those policies or practices were a result of ill will.

In talking about the Olympic Club, I gathered from the answer you just gave previously, when you were talking about this issue, you talked about insensitivity and indifference with regards to creating a stigma on professional people, women, minorities, and used the illustration of your daughter.

Judge KENNEDY. That is the distinction I drew.

Senator KENNEDY. I just want to make sure we have the whole response and answer here, so I have it correctly.

Judge KENNEDY. Thank you for giving me that opportunity. In my view, none of these clubs practiced invidious discrimination. That term is not a precise and crystal clear term. But as I understood it and as I have defined it in the questionnaire, none of the clubs did practice that, or had that as a policy.

Senator KENNEDY. But in terms of stigmatizing various groups, since this is a prestigious club, in what I gather was the general commercial life of the city, the fact that either women or minorities cannot belong to it, does that not serve to stigmatize those individuals?

Judge KENNEDY. There is no question that the injury and the hurt and the personal hurt can be there, regardless of the motive.

Senator KENNEDY. You resigned from the Sutter Club, as I understand.

Judge KENNEDY. Yes, sir.

Senator KENNEDY. Could you tell us the reasons—and that was in 1980, is that correct?

Judge KENNEDY. Yes. The Sutter Club is in downtown Sacramento. It is a club that is primarily used at luncheon by professional and business people.

I was always seen there as a judge when I went there. And I had concerns with their restrictive policies against women.

Again, some of the great leaders in Sacramento city life, some of my very best friends, people who have no animosity, people who have sensitivity and goodwill, are members of those clubs. I in no way wish to criticize them, because many feel as I do that the policy should be changed.

I, however, felt that my membership there was one where I was there only as a judge, and that it was inappropriate for me to belong. And I resigned in 1980 before the canons of ethics on the subject were promulgated.

Senator KENNEDY. And you resigned from there, as I understand, because of both its restrictive kinds of policies and because you were, as I understand it, a judge, and you didn't want to appear to have an inappropriate appearance, since it was more restrictive in terms of women and minorities.

Judge KENNEDY. Yes. Everybody knew me there as a judge, and would come up and greet me and so forth. And I felt uncomfortable in that position.

Senator KENNEDY. Well, if you felt uncomfortable with regard to the Sutter Club in 1980, why didn't you—and since you were meeting on the Circuit Court in San Francisco, and you had another club there that had similar kinds of problems, why didn't you feel uncomfortable with that club?

Judge KENNEDY. Probably because nobody knew me, and I basically used the athletic facility.

Senator KENNEDY. But it really isn't a question just of being known, is it? It's a question about what you basically represent or your own beliefs on this.

Judge KENNEDY. Yes, although I think sometimes continued membership can be helpful. In California the rule is that judges should remain in those clubs and attempt to change their policies and resign only when it becomes clear that those attempts are unavailing.

Senator KENNEDY. Don't you think the club's rules did actually then stigmatize women and minorities?

Judge KENNEDY. Well, they were not intended to do so. I think women felt real hurt, and there was just cause for them to want access to these professional contacts.

It is most unfortunate, and almost Dickensian, for a group of lawyers to meet at 11:30 and to settle a case and to celebrate and say, well, let's all go to the club. And suddenly there is a silence, and they cannot go because there is a woman there. That is stigmatizing. That is inappropriate.

Senator KENNEDY. Mr. Chairman, I understand my time is up. In my next questioning, I would like to come into the area of the voting rights issue.

I think I have indicated to you that I had hoped to be able to get to that at another time.

Judge KENNEDY. Yes, sir.

The CHAIRMAN. Thank you, Senator. Senator Hatch.

Senator HATCH. Again, I welcome you, Judge, before the committee. Let's revisit for a few minutes the question of club membership. Just a few questions do linger from that.

First, as I understand it, you joined the Olympic Club back in 1962; is that correct?

Judge KENNEDY. That is correct, sir.

Senator HATCH. You have described the club a little bit, but could you describe it a little further with regard to some of its public service and charitable activities that it supported?

Judge KENNEDY. Well, it has been a club that is principally prominent in athletics. And it has promoted athletics for young people in the community for over 100 years.

It is recognized as a club with a strong sense of civic obligation. It has athletic meets and so forth at its facilities.

Senator HATCH. As I understand it, the club came into being about 2 years before the Civil Rights Act of 1964.

Judge KENNEDY. The Olympic Club was founded in the 19th century and I joined in 1962.

Senator HATCH. And in 1962, I think it's fair to say, a lot of clubs did have the same policies as this club, and that was one of the reasons why Congress enacted the 1964 act to begin with.

So it took only a few years for individuals to understand this.

As I understand it, you mentioned that the Olympic Club was the site of the U.S. Open, and this was a great honor, as I understand it, for that particular club at that time.

Judge KENNEDY. Yes, sir.

Senator HATCH. What preparations did the club make for this national event?

Judge KENNEDY. I was not involved in it at all. I know from the press that it was a great event for the club, and they made arrangements to serve all of those who purchased a ticket to come in and watch the golf match, and they wanted to put their best foot forward, of course, because it is a great event.

Senator HATCH. And when the press learned that the club, according to its bylaws, was open only to, quote, gentlemen, unquote, what was the reaction, if you recall?

Judge KENNEDY. Well, the reaction in the community is one I can only gauge by the press. There were press stories on it. It did not seem to dampen attendance at the Open or interest in the Open.

But I thought there was a problem disclosed by that, and that problem was not going away. That was very clear.

Senator HATCH. Well, the reaction some thought might have been somewhat unexpected. Because as I understand it there were over a thousand women who had privileges at the club and had the regular use of its facilities.

But am I correct that they did that through their husbands or through some male members?

Judge KENNEDY. I cannot answer that question, Senator.

Senator HATCH. That was my understanding.

Judge KENNEDY. That is plausible.

Senator HATCH. Well, apparently, some of this heightened scrutiny that the press brought out and others brought out came to your attention. Was that about at the time when you began to discuss with the club leaders some of these problems?

Judge KENNEDY. Yes, sir.

Senator HATCH. You referenced that discussion in your letter dated August 7th, 1987, and you asked to be notified of the results of the poll of the membership, as I recall.

In fact, you said that—in your letter, you said, the fact is that constitutional and public morality make race or sex distinctions unacceptable for membership in a club that occupies the position the Olympic Club does, unquote.

Judge KENNEDY. That was my position. And I urged the board to go ahead with the membership poll and see if the bylaw change could be effected.

Senator HATCH. In other words, by your letter, by what you were doing, you were strongly urging the club to end the process of discrimination, or its policy of discrimination?

Judge KENNEDY. Yes, Senator.

Senator HATCH. Okay. I think another point that is worth repeating, it occurred in the first week of August—at that point Judge Bork was President Reagan's nominee. The hearings had not yet begun for Judge Bork, and most commentators felt that he would have a rough time, but they felt that he was going to make it through and that he was going to be confirmed. Moreover, your name had not yet surfaced as one of the leading candidates for the Supreme Court nomination in the way your colleague Cliff Wallace's name had arisen at that time.

I only mention this because we ought to be completely clear that you were acting, it seems to me, out of a sense of constitutional and public morality, as you said, not on the basis of any hint that there

might be a higher calling in your future when you wrote that letter.

So what was the outcome of the vote at the club?

Judge KENNEDY. I don't know what it was; three to two is my guess. There are some 7,000 members of the club. I had better not guess what the vote was.

I'm not allowed to come to meetings: I'm not a voting member, but apparently it was a great debate. The membership was divided on it.

Apparently the board of directors are going to continue to try to press for this change.

Senator HATCH. I see. When were you informed of that particular vote?

Judge KENNEDY. Well, I was originally informed that the vote had been successful, that the measure had been successful to change the by-laws.

So I congratulated myself for having played a small part in bringing the membership meeting about. It came to my attention about a week later that my information was wrong. The proposal had actually been turned down.

So I wrote a letter saying that my position had simply become untenable.

Senator HATCH. I see. Are you now a member of the club?

Judge KENNEDY. No, sir.

Senator HATCH. Well, it seems to me that under the circumstances your actions are basically above reproach. The most you could be faulted for is not recognizing the problem earlier, but then nobody else had recognized it either. Many other clubs have had similar policies and they have gone unnoticed as well. I am aware of a number of popular clubs here in the Washington, DC area, for instance, that have this same kind of policy. So I just wanted to bring that out because I think that is important.

Will you describe for us the Del Paso Country Club and its activities in support of worthy community ventures?

Judge KENNEDY. It is a country club in Sacramento with a golf course and a swimming pool. I had been a member of it when I was a boy. My family and children enjoyed it. And again, I have the greatest respect for the members of that club.

The by-laws of the club, in 1975 when I became a judge, used male pronouns and led to the inference that it was male-only membership, although there were some women members. I objected to the by-laws being written in those terms and the board of directors changed the by-laws.

My purpose in making the recommendation was so that it would be clear that women would be admitted to the club. Women are admitted to the club as members, but a quick look at the roster shows there is not any kind of a representative mix based on the professional community.

However, the club does not have a policy or a practice of excluding on the basis of sex or race as far as I know.

Senator HATCH. In fact, there have been women members of the club since the early 1940's, as I understand it, according to my records.

Judge KENNEDY. Yes.

Senator HATCH. Well, once again I can only say your actions demonstrate nothing it seems to me but heightened sensitivity to any perception of bias. You know, even when the by-laws might have been technically complied with, or might have technically complied with the law you urged an effort to remove any residual sense of difficulty there or problems. So I think that is an important point, too.

Judge KENNEDY. Thank you.

Senator HATCH. Your attention to your judicial and ethical duties I think is particularly underscored by your activities with respect to the Sutter Club. Can you describe that club again, and its activities?

Judge KENNEDY. That is a downtown club primarily used for luncheon. It is a very well-known club used by many in the government and in business. The club sometimes has grand functions in the evening which are open for parties that are sponsored by members, and persons of all races and gender are welcome.

Senator HATCH. I see. You joined that club in 1963, as I understand it?

Judge KENNEDY. Yes.

Senator HATCH. About then?

Judge KENNEDY. That is about right.

Senator HATCH. That also is one year before the 1964 Act, Civil Rights Act. In that case, however, the club's by-laws did not bar women but the club's practice seemed to exclude females.

Judge KENNEDY. That is my understanding, that the practice was fairly clear.

Senator HATCH. Well, when and why did you leave that club?

Judge KENNEDY. I was concerned about the policy of excluding women. I went to the club for lunch and was known, really, only as a judge. Although I had many close friends there, it seemed to me I was really there in my professional capacity. I was concerned about the appearance of impartiality.

Senator HATCH. Okay. Well, again I think your actions show extreme sensitivity to these problems, and I think that is much in your favor and I just want to compliment you for it.

Let me ask you about the Sacramento Elks Lodge. The propriety of your actions with respect to club memberships I think is bolstered with respect to the Elks Lodge. Can you describe the Sacramento Elks Lodge and its charitable and service activities?

Judge KENNEDY. Again, I simply used the club for its athletic facilities. I really was not an active participant in the club, but I know that they undertake any number of civic and charitable activities and that membership in the club is viewed by all who are in it as a privilege and as a way to furthering charitable and civic purposes.

Senator HATCH. What is that organization's policy with respect to women?

Judge KENNEDY. I do not know, Senator.

Senator HATCH. Okay. When did you join that club, and when did you resign?

Judge KENNEDY. It is in my questionnaire.

Senator HATCH. Okay.

Judge KENNEDY. I just do not have the dates. I believe I resigned shortly after I became a judge.

Senator HATCH. Well, I just submit to anybody looking at it carefully that that also is an instance of your responding to at least a perception problem back in 1978, and that was years before President Reagan was elected. And I think your actions as a whole on all of these matters are very commendable with respect to upholding your ethical duties as a judge. I just want to commend you on that.

Let me turn to another, totally different subject. Few provisions of the Constitution are more important to Americans and our way of life than the free speech guarantees of our Constitution, our first amendment. Accordingly, I would like to inquire a little bit about your record on free speech.

In the first place, let me just ask you what is your view of the importance of the speech clause and its role in our society?

Judge KENNEDY. The first amendment may be first, although we are not sure, because the framers thought of it as the most important. It applies not just to political speech, although that is clearly one of its purposes. In that respect it ensures the dialogue that is necessary for the continuance of the democratic process. But it also applies, really, to all ways in which we express ourselves as persons. It applies to dance and to art and to music. These features of our freedom are to many people as important or more important than political discussions or searching for philosophical truth. The first amendment covers all of these forms of speech.

Of course, the first amendment also protects the press. One of the unfortunate things about the case law is that the great cases on the press are *New York Times* v. *Sullivan* and *United States* v. *New York Times and The Washington Post.* But the press is not monolithic. In Northern California I believe that there are 37 small papers that in many cases are literally "mom and pop" operations where the editor has to stop writing at noon because he has to start working the printing press. These papers simply must have the protection of the first amendment if they are to be vigorous in reporting on matters of interest to their readers insofar as their locality is concerned. They vitally need the protection of the first amendment. It is not just for The Washington Post and The New York Times.

Senator HATCH. Well, our first amendment under American jurisprudence, of course, is a model for the rest of the world because it provides rights and privileges and it actually forbids any prior censorship or restraints on speech except in the most extenuating circumstances. And one of your cases dealt with an attempt to place a restraint on the broadcast of a TV program, and that was the 1979 case of *Goldblum* v. *NBC.*

Now would you explain why the privacy and fair trial interests of the petitioner, an executive officer implicated in the equity funding scandal, were not sufficient to block the broadcast of the TV program, if you remember that case?

Judge KENNEDY. What happened in that case, as I recall it, was that a person who was the subject of what is called a docu-drama was concerned that his rights were being infringed by the publication, or by the broadcast of the television show. He was a some-

what celebrated figure who had allegedly committed serious wrongdoings in a financial scam.

The trial judge was sufficiently concerned about the allegations that he ordered the television network to bring the tape to the courtroom and show the tape. This was a matter, really, of hours or maybe a day or so before the broadcast was to go on nationwide TV.

I presided over a three-judge panel in an emergency motion. He issued the order at 11:30 and we vacated it at 5 minutes to 12. We said that it was a prior restraint on speech and that for the district judge to order the film delivered was in itself an interference with the rights of the press. I wrote the opinion and issued it a few days later. That is the *Goldblum* opinion.

Senator HATCH. In my mind it is significant that the courts, too, have sometimes forgotten to protect the Constitution's prior restraint doctrine. Fortunately, other courts are available to correct those errors and that was a perfect illustration.

Although access to government records is not a first amendment speech issue, it is nonetheless related to the access which our citizens have to their government. In that sense, it is related to the very principles by which citizens participate in a government run by the people.

Now, in this regard, I was interested in your 1985 *CBS* v. *District Court* case. If you remember that case, I know sometimes it is awfully difficult, you have participated in so many cases. I don't mean to just isolate and pick these out of the air, but it is an important case. Could you discuss that with the committee? Would you also explain why the Government's effort to suppress the media's access to certain sentencing documents in a case related to the DeLorean trial was really rejected?

Judge KENNEDY. This was a case in which one of the coprincipals or accomplices in the DeLorean drug matter had entered a guilty plea and then applied to the district court, as is his right, to modify the sentence. The Government of the United States joined with the attorney for the defendant in asking that the documents be filed under seal.

The press objected. There was standing for the objection, and we ruled that those documents could not be filed under seal. We indicated that the public has a vital interest in ascertaining the sentencing policies of the court. I think I indicated that this is one of the least satisfactory portions of the entire criminal justice system and that the public ought to know if a sentence was being reduced and why.

Senator HATCH. One further first amendment issue arose in some of your past cases involving the operation of the Federal Election Commission. In the 1980 *California Medical Association* case, you decided that limitations on contributions to political action committees are not eligible for the full protections of the free speech clause.

When people contribute to a PAC they choose that committee in order to express themselves on political issues and they make the contribution to, in essence, advocate their views. Now can you explain why limiting this form of expression would not be a limitation on the free expression principles in the first amendment?

Judge KENNEDY. This was a case in which we were asked to interpret a new statute passed by the Congress. We thought we had guidance from the Court that controlled the decision. We expressed the view, as we understood the law of the Supreme Court, that this was speech by proxy. This was not direct speech by the person who was spending the money, rather he or she was delegating it to an intermediary. We thought that was a sufficient grounds for the Congress of the United States in the interest of ensuring the purity of the election process to regulate the amount of the contribution.

Senator HATCH. All right, let me turn for a few minutes to criminal law because you have an extensive record and background in criminal law and few people realize that no category of cases is more often litigated in the Supreme Court than criminal law cases. From my point of view, this is entirely appropriate because life and liberty, not to mention the order and safety of our society, are nowhere more at stake than in criminal trials. Accordingly, I would like to review with you a portion of your record on criminal issues.

Could you just give us the benefit of discussing with us generally how you approach the task of finding an appropriate balance between the procedural rights of the defendant and society's right to protect innocent victims of crime?

Judge KENNEDY. Well, Senator, I do not think that there is a choice between order and liberty. We can have both. Without ordered liberty, there is no liberty at all. One of the highest priorities of society is to protect itself against the corruption and the corrosiveness and the violence of crime. In my view judges must not shrink from enforcing the laws strictly and fairly in the criminal area. They should not have an identity crisis or self-doubts when they have to impose a severe sentence.

It is true that we have a system in this country of policing the police. We have a system in this country that requires courts to reverse criminal convictions when the defendant is guilty. We have a system in this country under which relevant, essential, necessary, probative, convincing evidence is not admitted in the court because it was improperly seized. This illustrates, I suppose, that constitutional rights are not cheap. Many good things in life are not cheap and constitutional rights are one of them. We pay a price for constitutional rights.

My view of interpreting these rules is that they should be pragmatic. They should be workable. We have paid a very heavy cost to educate judges and police officers throughout this country, and the criminal system works much better than many people give it credit for. In every courthouse at whatever level throughout the country, even if it is a misdemeanor traffic case, the judge knows the *Miranda* rule, he knows the exclusionary rule, and so do the police officers that bring the case before him. We have done a magnificent job of educating the people in the criminal justice system.

On the other hand, it is sometimes frustrating for the courts, as it is frustrating for all of us, to enforce a rule in a hypertechnical way when the police or the prosecutor have made a mistake in good faith. The good faith exception to the exclusionary rule is one of the Court's recent pronouncements to try to meet some of these concerns. It remains to be seen how workable that exception is.

Sometimes exceptions can swallow the rule, and the Court has yet to stake out all of the dimensions of this exception.

That is just a rough expression of my general philosophy in the area.

Senator HATCH. That is good. As I mentioned earlier, nearly one-third of the Supreme Court's time is consumed in criminal trials, criminal matters. It seems to me that this is very appropriate for another reason because studies have shown that the poor, the aged, women, the minority groups are disproportionately victimized by crime and when our criminal justice system fails these groups are the first to suffer. So what role do you think the plight of victims of crime ought to play in the criminal justice process?

Judge KENNEDY. You know, Senator, I went to one of the great law schools in the country—I am sorry Senator Specter is not here to agree with that—and I never heard the word "victim" in three years of law school, except maybe from the standpoint of an apology that a corpus delicti was not present. This is the wrong focus. We simply must remember that sometimes the victim who is required to testify, who misses work without pay, who sits in the courthouse hallway with no special protection, and who is stared at by the defendant and harassed by the defendant's counsel, undergoes an ordeal that is almost as bad as the crime itself.

The Congress of the United States has made a very important policy statement in passing the Victims Assistance Act. It has given the courts a new focus, and a focus that is a very, very important one in the system. Judges recognize that victims, too, have rights.

Senator HATCH. I think that is great. In October of 1987, the Bureau of Justice Statistics reported that the rate of violent crime dropped 6.3 percent in 1986. Now, of course, this was no consolation to the victims of crime, but it is important to realize that since 1981 the rate of violent crime has dropped nearly 20 percent; 7 million fewer crimes occurred in 1986 than in the peak year of 1981. That does not mean that the battle is being won. I am sure we will find statistics to show that drug abuse and its link to crime is definitely on the rise.

Nonetheless we are gaining ground on crime to some degree. Do you feel that the courts have a role to play in ensuring that this hard-won progress on crime continues?

Judge KENNEDY. Absolutely, Senator. They are the front-line agency for administering the criminal justice system, and we have much to do, particularly in the area of corrections, which judges do not know much about. But in so far as the enforcement of the criminal laws, the courts do have the responsibility to ensure that their procedures are efficient, that they understand the law, and that they apply it faithfully.

Senator HATCH. In this regard, I would like to discuss with you one of your death-penalty cases, namely, the *Neuschafer* v. *Whitley* case.

Judge KENNEDY. Yes, sir.

Senator HATCH. As I understand that case, an inmate had murdered another inmate, and when you first received the case, you sent it back to the lower court to make sure that the evidence in that case—it was a statement by the accused—was proper. Now

when that was established, the case returned to you, and several arguments were made against the State's decision to order the death penalty.

Could you recall some of the arguments and why they were insufficient in that case?

Judge KENNEDY. Senator, I have a little difficulty in answering that question because my characterization of the arguments might bear on the petition for rehearing.

Senator HATCH. Sure. All right. Then I will——

Judge KENNEDY. That case is still before us.

Senator HATCH. That is one of those cases that goes on and on, then.

Judge KENNEDY. I would rather not characterize an argument in a way that would seem either too generous, or too limited for the particular parties in that case.

Senator HATCH. Well, let me move to another capital-crime case in which you were involved, and that was *Adamson* v. *Ricketts*, and I do appreciate your sensitivity there, and this involved the murder of an Arizona newspaper reporter with a car bomb.

As I understand it, the defendant had confessed to the murder but had escaped the death penalty in the first trial because of a plea bargain.

Now, would you briefly state the facts of that case, and how you became involved.

Judge KENNEDY. This case is also appearing before us—or, rather, is still before us on remand from the Supreme Court of the United States—so I will give only a capsule description.

A newspaper reporter was killed when a bomb was placed in his car by a person connected with the Mafia. The reporter lost both arms and both legs, but lived for 10 days.

He identified the defendant in this case, Adamson. Adamson was brought to trial, but the question was whether or not Adamson would tell who paid him to do this work. As part of a plea bargain, Adamson did agree to testify, and in exchange, the State of Arizona reduced the charge to second-degree murder. I think that is accurate; but, in any event, the State dropped the capital sentence demand that it had made earlier. Adamson did testify, the two were convicted. The Supreme Court of Arizona then reversed, so another trial was called for.

At this point Adamson said that he wanted to change the deal. The question came to our court whether or not his double jeopardy rights had been properly protected. Some of my colleagues thought they had not. Some of us thought that the plea bargain itself was clear warning to Adamson that he had certain rights that were being waived.

I was in the dissenting position. The Supreme Court of the United States agreed with the dissenters. The case has now been sent back to the ninth circuit on other issues.

Senator HATCH. Well, in other words—my time is up—but in other words, the Supreme Court overturned the majority of your court——

Judge KENNEDY. Yes, sir.

Senator HATCH [continuing]. And followed your dissent——

Judge KENNEDY. That is correct.

Senator HATCH [continuing]. In finding that the plea bargain should not figure into the double jeopardy clause in this particular instance, so that resulted in the reinstatement of the death penalty for the cold-blooded car bombing. Is that correct?

Judge KENNEDY. Yes, sir.

Senator HATCH. All right. Well, I have a lot of other questions, but I have appreciated very much the responses you have made here today.

Judge KENNEDY. Thank you, Senator.

Senator HATCH. Thank you.

The CHAIRMAN. Thank you, Senator. As I indicated earlier, we will very shortly recess for 15 minutes, and then we will come back and stay at least until 5 and no later than 6.

So we will recess now for 15 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Well, Judge, how is it so far?

Judge KENNEDY. It is very fair, Senator. Since I have been doing this to attorneys for 12 years, it is only fair that it be done to me.

The CHAIRMAN. Senator Simpson is worried about your students. He wants to make sure they are observing.

I will now yield to my colleague from Arizona, Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

Judge Kennedy, I appreciate your candidness and response to previous Members here. I think it is very helpful, and quite frankly, I think it tells us something about you, both as a jurist and as a lawyer, and as a family person of values and sensitivity, and that is important to this Senator, and I think it is important to the process.

I am very interested, Judge Kennedy, as I discussed with you briefly, the Equal Protection Clause in the 14th amendment, and I would like to review some of that.

Based on some of your decisions, and your teachings, I consider you an expert in it, and I do not consider myself in that vein at all. However, it is of great importance to me, for many compelling reasons. With regards to race discrimination, as you know, the courts have employed a strict scrutiny test, and require that a compelling interest be shown, in order for the statute to survive review.

Additionally, fundamental rights, such as the right to travel, the right to vote, the access to the judicial process, enjoy the benefit of a strict scrutiny analysis.

In gender discrimination cases the Court employs the heightened scrutiny test, sometimes called the intermediate scrutiny test. The classifications, by gender, must serve important governmental objectives and must be substantially related to achieving those objectives.

There is some suggestion that both alienage and illegitimacy enjoy the same type of analysis—intermediate scrutiny. All other forms of discrimination, economic and social, receive the lowest level of scrutiny known as the rational basis test.

I offer this abridged review to set the basis for the few questions I would like to ask you.

Justice Marshall, as you are aware, has proposed a sliding scale—I guess you would call it—approach to analyzing equal protection claims.

He suggests that instead of cases falling into neat categories, as the Court has so put them, a spectrum be used to review claims of discrimination, and this spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize, particularly classifications, depending, I believe, on the constitutional and social importance.

Now, when Judge Bork was here, it became very clear to many of us that there was a fundamental disagreement here. I am not here to peg you against Judge Bork at all.

What I would like to know, Judge, is some answers to some questions, if you would, please.

In reviewing the opinions you have written, I notice that in the equal protection area, you have had little opportunity to express yourself, I think maybe six opinions, the best that I could encounter.

Is that accurate or have we not found more decisions? Or do you know?

Judge KENNEDY. I have really not had the opportunity, Senator, to address, in any detail, the levels of scrutiny that apply to gender, or, to compare them to race.

I think you are correct. I have had Equal Protection Clause cases, mostly in the implementation phase rather than in defining substantive liability.

Senator DECONCINI. And it is roughly a half a dozen opinions, to your recollection?

Judge KENNEDY. I would think that would be correct, Senator.

Senator DECONCINI. I would like to explore with you the analysis you do apply, or the approach you take, and not to get into any particular case or circumstances that would be a potential case before you, but how you view the Equal Protection Clause.

Would you agree, first of all, that the Equal Protection Clause applies to all persons?

Judge KENNEDY. Yes, the amendment by its terms, of course, includes all persons, and I think was very deliberately drafted in that respect.

Senator DECONCINI. And of course women being in that category. As I understand, that the Court has developed some standards, and they refer to them in the race cases, considered a "suspect classification," I think is the Court's term, and the standard of review is known as strict scrutiny, as I mentioned.

Additionally, for the State to justify discrimination based upon race, would require a showing of a compelling interest. Is that your fundamental understanding of the strict scrutiny standard that the Court has referred to in various decisions?

Judge KENNEDY. That is my understanding of the standard that the Court has enunciated.

Senator DECONCINI. Can you conceive of any situation where discrimination based upon race would be legitimate under the Equal Protection Clause?

Judge KENNEDY. I cannot think, at the moment, of any of the standard law-school hypotheticals, that would lead to the conclu-

sion that a racial classification that is invidious would be sustained under an equal protection challenge.

Senator DECONCINI. Your record certainly indicates that you have not had any cases, that has squarely been presented to you, that I can find at least, but I just wondered if you had any hypotheticals, because I find I can make up some hypotheticals, but I just would like to see whether someone else has, if they have thought about it.

With respect to this standard of strict scrutiny, analysis employed by the Court today, is it your understanding that a fundamental right, such as the right to interstate travel or freedom of speech, are protected in the same manner as the race discrimination? Or non-race discrimination?

Judge KENNEDY. Yes, and sometimes those cases are difficult, because if you have a first amendment case, it often can really be explained on its own terms. The first amendment sits on its own foundation, so it is sometimes puzzling why we even need an equal protection analysis in such cases, although the Court has had first amendment cases in which it uses an equal protection analysis.

Why that is necessary is not clear to me, since one of the essential features of the first amendment is that we cannot engage in censorship. Censorship involves choice, so the first amendment does seem to have its own foundation in this regard.

Senator DECONCINI. Focusing, Judge Kennedy, on gender discrimination, discrimination based on sex, I understand that the Court has developed what is popularly known as the heightened scrutiny test, as I mentioned, or intermediate scrutiny for this type of discrimination case brought before the Court.

Do you recognize that, or agree that is the standard the Court now has set out.

Judge KENNEDY. That is my understanding of the case law. The Court, as an institution, and the judicial system generally has not had the historical experience with gender discrimination cases that we have had with racial discrimination cases. The law there really seems to me in a state of evolution at this point. It is going to take more cases for us to ascertain whether or not the heightened scrutiny standard is sufficient to protect the rights of women, or whether or not the strict standard should be adopted.

Senator DECONCINI. There is no question in your mind, that the Supreme Court is very clear—and whether they are termed conservative, or liberal judges, or moderate—whatever they may be—that the judges recognize those standards, and you also subscribe to the standards in general principle?

Judge KENNEDY. Well, it may be that in resolving one of those cases, I would give attention to Justice Marshall's standard and make a determination whether or not that is a better expression than the three-tier standard that the Court seems to use, although it seems to me, on analysis, that those are very close.

Senator DECONCINI. Now I also understand that classification based on gender must serve as an important governmental objective, and must be substantially related to the achievement of certain legislative goals.

Have you delved into that, or have any thoughts on that?

Judge KENNEDY. No. I understand what the Court is driving at, and as I have indicated, it is probably because the Court simply lacks the historical background to feel that it can impose the strict-scrutiny standard without causing problems for itself down the line.

Senator DECONCINI. Without committing you on anything that you might do as a Supreme Court Justice, do you think, generally thinking, that that is a proper legal conclusion that the Court has come to in this area?

Judge KENNEDY. Well, I think the Court has, as I say, recognized the fact that the law is in a state of evolution and flux, and is proceeding rather cautiously.

Senator DECONCINI. You do not have some personal hostility towards the way the Court is proceeding in this particular area of gender discrimination as it relates to the Equal Protection Clause?

Judge KENNEDY. The cases seem to me a plausible and rational way to begin implementing the Equal Protection Clause.

Senator LEAHY. I am sorry. I did not hear that.

Judge KENNEDY. The cases seem to me a plausible and a rational way to begin implementing the Equal Protection Clause.

Senator LEAHY. I thought you said plausible and irrational. Thank you.

Senator DECONCINI. And of course with reference to other forms of discrimination we have what is known as the rational basis, which, if you accept the different standards we have—and I do not make those decisions, but I certainly have read enough cases--that it seems clear to me, that even if you feel, a judge feels that a set of facts may not fall into the heightened scrutiny, or into the rational basis, that there is so much precedence here—and as you say, it may be new, and does not have a long history of it—it appears to me to be very fundamental, that the Court is set, at least on a course, to help guide lower courts, to help guide legislative bodies, where these scrutinies are going to be placed.

As to the rational basis test for other discrimination, do you recognize that as a given standard that the Court has pretty well settled on for other discrimination, other than gender and race?

Judge KENNEDY. Yes, it is, and as we know, all laws discriminate.

Senator DECONCINI. That is right.

Judge KENNEDY. You can get a driver's license if you are over 16 but not if you are under 16. Yet we know that there are some drivers who are under 16 who are much better than many drivers who are over sixteen. But we have a fixed and arbitrary standard. That is the way laws must be written in order to have an efficient society and an efficient legislative system.

Senator DECONCINI. Have you delved at all, either in your job as a judge, or as a teacher, with Justice Marshall's sliding scale?

Have you written anything or done anything in that area?

Judge KENNEDY. I have not written on it.

Senator DECONCINI. You are aware of it yourself?

Judge KENNEDY. I ask my students to explain to me why there is any difference between that and the three-tier standard, and I am not yet satisfied what the correct answer to that question should be.

Senator DECONCINI. Then there is the proposition that has been mentioned—I believe it is Judge Stevens—about a reasonableness standard as a sole standard, and of course the Court has not accepted that, although I believe Stevens is the only one that has mentioned that, and of course as we said, Marshall, a sliding scale standard.

The reasonable standard poses problems to this Senator, but I welcome people who might disagree with that.

Have you formed either a preference, or do you have any distinction in your mind between a three-tier standard that we have been talking about, and the importance of it, particularly as it relates to gender, and a reasonableness standard for all discrimination cases?

Judge KENNEDY. I do not have a fixed or determined view. I would offer this observation: one beneficial feature of a tier standard is that the court makes clear the substantive weight that it is giving to the particular claim before it, and the court can then be criticized, or vindicated as the case may be.

It sets standards. And the lower courts have a certain amount of guidance. The Supreme Court is in the difficult position of hearing 150 cases a year, and in doing so, providing the requisite doctrinal guidance and supervision of the lower courts.

This is a very difficult task, and not much has been written on the difference between an intermediate appellate court judge, such as I am, and the responsibilities of the judge of a supreme court of a State or the Supreme Court of the United States.

Judge Sneed of our court is always careful to point out that this is an area of academic inquiry that should be explored. I think the requirements, and the duties and the obligations, and the concerns of those two different courts may be quite divergent.

Senator DECONCINI. The interesting thing, as one views this—and I think you make a good point, the history behind the Court's struggle as it relates to the sex-discrimination cases—is the importance to the lower courts to see something coming from the Court that is a bit consistent, even though it may fall into different standards as they come.

Judge, as an appellate judge, how helpful is that when the Supreme Court has these fundamental cases, if you want to call them, where they start to become consistent in their holding and a standard starts to emerge?

Is that as obvious to the federal judges, yourself, as it is to me, that that would be extremely helpful, or is it difficult to implement?

Judge KENNEDY. It is tremendously helpful. We wish that the Supreme Court could review most of our cases.

As you know, the Supreme Court takes only about 2 percent of the judgments of the circuit courts, and within that case mix it has the duty to give us the necessary guidance.

This of course is the way the case law method evolves, but we wish we could have more guidance from the Court.

Senator DECONCINI. I would like to turn to another subject matter. The Chairman touched on it somewhat this morning, regarding your Canadian Institute speech that you made in December of 1986, and as it relates particularly to the privacy question.

On page 9 of that text, you state that:

It is difficult for courts to determine the scope of personal privacy when it is specifically mentioned in a written constitution, and that courts confront an even greater challenge when the Constitution omits language containing the word privacy, or private.

Now in discussing the legislation, and the legitimate sources for the right of privacy, you mentioned the Supreme Court cases, the *Bowers* case, and the *Griswold* case.

And it appears from reading your speech, that you have concluded, without question, that there is a fundamental right to privacy. And I think the Chairman had you state that, and that is your position, correct?

Judge KENNEDY. Well, I have indicated that is essentially correct. I prefer to think of the value of privacy as being protected by the liberty clause; that is a semantic quibble, maybe it is not.

Senator DECONCINI. But it is there, is that——

Judge KENNEDY. Yes, sir.

Senator DECONCINI. No question about it being in existence?

Judge KENNEDY. Yes, sir.

Senator DECONCINI. Now the Chairman also touched a little bit on the ninth amendment, and just out of education for this Senator, do you have an opinion why the Supreme Court seems to shy away from using that ninth amendment for some of these unspecified rights that have been, I think quite clearly enunciated by the Court, vis-a-vis the right of privacy?

Judge KENNEDY. Again, I am not sure. I think the Court finds a surer guide in the 14th amendment or the fifth amendment, because the word liberty is there. In the ninth, of course, it is simply an unenumerated right.

I think also that the Court has this problem: as we have indicated, Mr. Madison, and his colleagues, were concerned with the ninth amendment to assure the States that they had adequate freedom for the writing of their own constitutions, but under the incorporation clause that is flipped around.

Under the incorporation clause, the ninth amendment would actually be used as a constraint on the States, and I think the Court may have some difficulty in moving in that direction. I do not think the Court has foreclosed that, and I do not think, for reasons—as I have indicated—that it should address the issue until it has to.

Senator DECONCINI. It just quite frankly fascinates me—not being a judge—and I ask that question purely for myself, just wanting to know what a judge thinks. If we were sitting in my office or at a social function, I might just ask you that question, because I have never quite understood why the Court has ruled as it has. I think you probably have as good an observation, or better than I do.

You have asserted, Judge Kennedy, that the opinions in the *Griswold* case and the *Bowers* case, that they are in conflict, and on, I think it is page 13 of your Canadian Institute speech, you discuss whether a right is an essential right in a just system, or an essential right in our own constitutional system.

You state that, quote: "One can conclude that certain essential or fundamental rights should exist in any just society." End of quote.

But then you say, quote: "It does not follow, that each of those essential rights is one that we, as judges, can enforce under the written Constitution. The due Process Clause is not a guarantee of every right that should inhere in an ideal society." End of quote.

How would you define the enforcement power given to the judiciary?

Judge KENNEDY. Well, the enforcement power of the judiciary is to insure that the word liberty in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it.

There are many rights, it seems to me, that you could put in a charter if you were writing a charter anew. The right to be adequately housed and fed, and education, and other kinds of affirmative rights.

You see this in the European Convention on Human Rights, which is what I was trying to contrast in the Canadian speech with the Canadian constitution. We had three documents. It seems to me an important point, that the Constitution works best if we have a stable and a just society.

The political branches of the Government can do much to insure that these preconditions exist for the responsible exercise of our freedom. And I think the courts are subjected to constraints, obviously, that the political branches are not, especially in that the courts cannot initiate those programs and those requisites that are necessary to insure that some very basic human needs are met.

Senator DECONCINI. Some of those, quote, "basic human needs of society," are you saying, really rest with other branches of government, to see that they are available?

Judge KENNEDY. That would be my general view.

Senator DECONCINI. In your 1986 speech, you also advance, or you said that the right to vote, quote, "is not fundamental in the sense that like the privacy right, it supports substantive relief of its own. It operates, instead, as a fundamental interest that triggers rigorous equal protection scrutiny." End of quote.

Am I correct to conclude from this statement, that you think the right of privacy is a right, freestanding, which though not found in the Constitution, requires similar consideration as those rights that are indeed enumerated in the Constitution?

Judge KENNEDY. I think that is——

Senator DECONCINI. Is that a right interpretation?

Judge KENNEDY [continuing]. Generally correct to the extent that we can identify that is a privacy interest. It struck me, as I was preparing this speech for the Canadian judges, that the voting rights cases are very interesting. I think most of us think of voting as absolutely fundamental, and it is so listed in the Canadian constitution. This is a new constitution that the Canadians have adopted, and their judges were there to see what benefit federal judges in the United States could give them in interpreting the document.

I found, doing the research for this, that although we think of voting as a quintessential fundamental right, the Supreme Court has not recognized it as a right that necessarily supports an action. Though you may think that you have a right to vote for a sheriff because in some States they are elected, the Supreme Court has

not so far recognized that you have that right. That is why it is not a fundamental right on which one can base a cause of action.

It is a right that we recognize so that the vote cannot be diluted.

Senator DECONCINI. You mean that specifically the right to vote for sheriff is not the same right as the fundamental right to vote? Is that where you are drawing a distinction, that that is a political subdivision, whether or not the right to vote for sheriff, or whether there is a vote for sheriff——

Judge KENNEDY. Yes. As I understand the case law, the Court has been very cautious about stating that there is a fundamental right to vote that stands on its own foundation, simply to avoid having to make this kind of inquiry.

Whether or not one of those cases will arise in the future, I am just not sure.

Senator DECONCINI. You have written a very interesting case, your opinion in *Beller* v. *Middendorf* case, dealing with the right of privacy and homosexuality as it relates to certain regulations.

The analysis of that case, if I understand it, was of some distinction as to the regulation vis-a-vis the actual right of a homosexual act. Is that correct?

Judge KENNEDY. I think that is a beginning point.

Senator DECONCINI. And where your opinion zeroed in on. Now criticism has been levied against your decision in the *Beller* case, particularly the National Women's Law Center, asserting that in the *Beller*, you incorrectly rejected a fundamental right, or the analysis of a fundamental right in favor of a more easily met balance test when applying substantive due process analysis to this particular set of regulations, and vis-a-vis, that it was relating to the military.

Can you address the distinction of this case for me, and your thoughts, when you came to the conclusion that the military regulations demanded a different view as to the right of regulating that right of privacy, assuming that the right was there?

Judge KENNEDY. Yes.

Senator DECONCINI. As we know, just for the record, Judge, that case has gone to the Supreme Court and no longer is one that would be pending for you to have to decide on.

Judge KENNEDY. Yes, this was really, I think, the first case in the circuits on the question whether or not the armed services, in this case the Navy, could dismiss its personnel for having engaged in homosexual conduct while in the military. This case required the court to undertake a rather comprehensive study of what the Supreme Court had said on the issue to that point. We reiterated what we thought the Supreme Court had taught us with reference to substantive due process, to the rights of privacy and to the rights of persons, and we set forth there our understanding of the rules. We assumed arguendo, made the assumption, that in some cases homosexual activity might be protected.

We did not say it would be because that issue was not before us. We decided instead only the narrow issue of whether or not in the specific context of conduct occurring in the military the Navy had a right and an interest which was sufficient to justify the termination and the discharge of the personnel.

Senator DECONCINI. And that is because the regulation was only before you and not the question of whether or not there was a right of privacy for this activity; is that what you are saying?

Judge KENNEDY. Well, that is correct except that you might have argued that this right was so fundamental and so all-embracing that the military could not——

Senator DECONCINI. Could not infringe on it.

Judge KENNEDY. Could not abridge it in any event. For analytic purposes, we simply left to another day the question whether or not there is this fundamental right. In other contexts, we assumed that there could be. We said that in the context of the military there were adequate, stated, articulated reasons for the enforcement of the policy.

Senator DECONCINI. I read that case very carefully more than once because of the significance of what I consider judicial restraint, and my compliments about the case, but it seemed to me a great temptation for a judge who wanted to express an opinion for or against there being a fundamental right for the homosexual activity not to do so. I think the greatest compliment I can pay you, Judge, is that you stayed with the issue there that I think was very clear. But quite frankly, if a court had gone off the other way I might have disagreed with him or I might have agreed with him, and sometimes the court does. And I really wanted to say that that opinion, as many of your opinions, have impressed upon me your real strict understanding of what you think judicial restraint is, and trying to exercise it.

I may disagree with it or someone else may, but I think it is fundamental and very complimentary to you and the President for choosing someone who has that restraint in their mind.

Judge KENNEDY. Thank you, sir.

Senator DECONCINI. Thank you. I am finished for now. I do want to talk to you about judicial tenure, a subject that you and I have shared some fun over the last years, and we will do that tomorrow I guess.

Judge KENNEDY. I am looking forward to that, Senator.

Senator DECONCINI. Thank you, Judge Kennedy.

Recognize Senator Simpson because Senator Biden isn't here.

Senator SIMPSON. I thought maybe we were going to take over there for a minute. With the Chairman gone, it was marvelous opportunity, but I see you were prepared.

Like Senator DeConcini, I found that case fascinating for its clarity and getting just to where he wanted to get and not one whit further. It was a superb decision, the one that Dennis speaks of. Dennis and I come at each other occasionally in this league, but he is a fine lawyer. I have a great respect for him. But I have exactly the same feelings about that case in reading it and knowing what a hot one that was.

You know, you could have at any point gotten off onto a little Hindu, some philosophy or something else, or morals or everything else, but you really did a beautiful job with that.

Well, I am interested in you doing very well in the surveillance that is being performed here. I don't know if I—I sometimes forget, but I can't help but tell you that in the last such proceedings there was a gathering of various groups who said that they wanted to

find the transcript of the law school records of all the members of the judiciary to see just how well we all did.

The CHAIRMAN. I sent mine. Did you send yours? [Laughter.]

No, I make it a habit of not picking mine up. I never have.

Senator SIMPSON. I am going to move right on now. I have nothing more.

But I was interested, I told them, I said, I am glad you asked that question because, I was in the top 20 of my class. And there was a scribbling and that was the end of that, and they went off, I guess, to check.

But the interesting thing was, then I think I turned to Joe and I said, "That is going to be great." I said, "There were only 18 of us in our class." [Laughter.]

So we get the surveillance. Indeed, we do, and there will be ever more of that, and is, in this league. But with that the light comes back to privacy. What is this right of privacy? We talked about it a lot with regard to Judge Bork, an awful lot. This right to privacy, what is it? You know, and you get into it. It is a detonator, and you have answered that very well so far.

I think the most pungent comment on it was Judge Griffin Bell, our former Attorney General, who said that the right of privacy is the right to be left alone. He really cut through the fog as we were dissecting the right to privacy and where it was with *Griswold* and whether it was written or unwritten, or in the Constitution or out of the Constitution, or innate or conditional, is the right to be left alone. That is something that really means something I think to the American people. At least the average guy, he likes that.

And then as I say, I shared with many my frustration that at the very time these very high-blown probes were going on with regard to that there were few worthies who were finding Judge Bork's video rental records to find out what he was renting, hoping to find all sorts of things. My mother has written me about that and talked to me about that, and I won't go into that. It was a rather smart phrase.

But I commend the ACLU who rallied to that in a moment. The District of Columbia is now dealing with a statute on that. There is a House bill in on that, and I am certainly going to be looking into that from the Senate side. So there's some positive results—but those are more real examples than, you know, law school theories out there on the right to privacy. In my mind they are.

Then I was interested in your comments on the two cases, *Topic* v. *Circle Realty* and the *Mountain View-Los Altos Union High School District*.

Judge KENNEDY. Yes, sir.

Senator SIMPSON. Hearing your explanation of those was very important to me. You used the phrase "we ruled," and I think that we don't want to forget that, as I understand it, and you can respond, that those were both unanimous decisions of a three-judge group. I mean, I don't know what you call that in your——

Judge KENNEDY. That is correct, Senator. It was a three-judge panel on each of those cases.

Senator SIMPSON. Panel.

Judge KENNEDY. And, as you know, each judge researches the record independently and we usually come to the bench not having

conferred with one another in order to ensure both the fact and the appearance of fairness for the litigants. We confer only after the oral argument.

Senator SIMPSON. In the *Topic* case, there was Justices Chambers and Trask and yourself.

Judge KENNEDY. Yes.

Senator SIMPSON. And in the *Mountain View* case, Justices Trask and Poole and yourself.

Judge KENNEDY. Yes.

Senator SIMPSON. And those were unanimous decisions and, as you say, an interesting finding as to how you come to those, giving every evidence of fairness in that; isn't it?

Judge KENNEDY. That is correct. We thought both of them were close cases in which we were trying to divine the will of Congress.

Senator SIMPSON. I had a feeling that one on the disabled child would be a very important one and probably will be reviewed again, so I was particularly interested in that, you know, because it is so easy to pick an issue and say how will you vote on this or—for us, how do you vote on this, Simpson? You can't vote "maybe", you have to vote yes or no. It is a very precise activity here.

I was very interested in how you did decide because you obviously were impressed, and you have said it here. The facts of that case were rather unique in a sense. This boy, this son who was involved here had some extreme behavioral problem. It said, while the assessment was taking place the boy was excluded from school for repeated misconduct. It went on, they stopped the process then. They stopped, and no one knows why.

Then there was the offer to send a teacher to the boy's home for instruction. District personnel recommended private schools. The appellant placed the boy in one of the schools and he was expelled for continued misbehavior and then he attended another. He was a very disruptive young man apparently is what I gather. It is a very short opinion.

And then it was determined that he be placed in a resource classroom in a regular public school program, and the appellant, still dissatisfied, requested an administrative hearing under the Act and the administrative law judge determined the parents were entitled to reimbursement.

The school district then brought the action and the appellant was saying that—the district court, of course, adopted that and held the appellant had violated the so-called "stay put" provision—I wouldn't want that to get left out here—by placing the boy in this other school before the administrative proceedings were concluded.

That is a very important thing because it says very clearly that during the pendency of any proceeding conducted pursuant to this section unless the State or local education agency and the parents or guardians otherwise agree the child shall remain in the then current educational placement of such child until all such proceedings have been completed.

I was fascinated by the precision of that. She was saying that her actions were not unilateral and they were saying they were, it was that simple, I guess. And you were saying something that is said to us all the time as Congresspersons. Why do you pass laws that

leave the burden on the local districts or the local county or the municipality?

Your decision said that the threat of damages in a case like this would not make compliance any more likely and would subject school districts to contingent liabilities hardly foreseeable when the annual school budget is prepared.

Now, with disabled children and the disabilities and special education, one of the most serious problems in the United States is that the school districts can't afford it. And they tell us that when they go home, but who is going to come back here and say you can't afford to take care of disabled children, so we don't say much about it. We just pass another law and ship it back to the local district.

Some districts are paying out $100,000 and $200,000 for maybe one person in one year, and we just sit and say go ahead, that is your job. Now that won't last much longer. They can't stand that burden.

So it is such a well-focused opinion. A very well-centered and reasonable decision, and I don't think it should have any kind of flavor that somehow you are not sensitive to the disabled in our society. And I don't think that was the intent but we surely wouldn't want it to be at all expressed in that form because that is not what it dealt with as I see it. Compassion was there but this was, under the fact situation, a most difficult person.

And we do that with our new asbestos law. We passed a dazzling law about asbestos in the schools and then just sent it back to the States and said go to it. We don't know where you are going to get the money to do two or three hundred grand worth of ripping asbestos out of a school built in 1930, but get at it. And this is the same kind of thing that we do well, and I think you called attention to that.

Well, that is just my view of that. Some of that of that case.

Then with regard to discrimination, that certainly came up and it has come up again here today. Discrimination based on gender, I don't like to harp here but I think it is so important that we just try to keep a continuity. We have a situation where six members of this 14-member panel have voted to cast a vote specifically to discriminate against women based solely on their gender. That may be a bit surprising but it is very real and you can't describe it any other way; and that is, to exclude women from the draft.

And six members of this panel, three from each side of the aisle, so we don't get into sloppy partisanship, voted to exclude women from the draft, which is obviously and patently a discrimination against women based solely on their gender. There is no other way to describe that that I know, as a lawyer.

So that is interesting, when we get into those tough issues that seem so good when they appear in law review articles, but in real life they are just plain tough.

You cited a very interesting thing about, I think you were talking about advocacy before the courts. The quality of advocacy has gone down, I hear you saying, or is not what it should be. Would you develop that a bit more? Tell me a little more about that. How do you feel about that?

Judge KENNEDY. Well, Senator, sometimes one asks the question, does a good lawyer really make a difference? The questioner I think, may think it a trick question because if you say yes, then you are not listening to the law, and if you say no, then you are just wasting your time listening to the oral argument.

But these cases are very, very difficult, and the law draws its sources from many places. Judges listen to many voices. The constraints and the compulsions of the facts of the particular case, and of the legislative history, all have to be brought to bear on the specific case before the court. Far more often than most people realize, the three judges on that panel all have their minds made up during the oral argument.

It is the time that I use to make up my mind. I wait until that oral argument. It is a tremendously important half hour or hour. It is very important that counsel be skilled.

Oh, sometimes we know that the counsel just has not seen the problem, and we will see it for him and save the case. But really, we have to impress upon the bar that the duty of the lawyer is to the client, and he may not let the court do the work for him or her. There should just be no shoddy practice in the federal courts; and there is too much of it.

Senator SIMPSON. Well, I think it was former Chief Justice Burger who made some statement years ago that we were doing 747 litigation with Piper Cub pilots, or something like that, and I think that is true. I admired Justice Burger, a Chief Justice, in so many ways a superb human being. He is a delightful gentlemen. I have come to know him personally and that has been my great gain.

Would you, if you were on the Supreme Court, and I honestly and sincerely hope you will be, would you hesitate to write and speak on that subject of lawyers when you are addressing the American Bar Association or the federal bar? Is that something you would like to get involved in, making our profession better and speaking as one who has heard these men and women before you?

Judge KENNEDY. I am committed to that. The former Chief Justice, Mr. Chief Justice Burger, did a marvelous service to the Constitution and to the rule of law when he insisted on this throughout the country. This is not to denigrate the legal profession or the law schools. They are doing a magnificent job.

But one of the frustrations of being a judge is that we get away from the practice somewhat. I see or hear of things going on in the practice, and conclude the ethic is changing out there. The law practice has become much more of a marketplace than of an ethical discipline, and I am concerned about that. But I am so far removed from the practice that I am not sure there is a whole lot I can do about it, other than to talk about the problem.

Senator SIMPSON. But you would be talking about that if you were on the Supreme Court bench?

Judge KENNEDY. I think it is vital.

Senator SIMPSON. That is very important to hear you say that. I think it is critical. I practiced law for 18 years and I loved it, and I did everything from the police court to the federal district court—everything. And now in the marts of trade, the law school students are interested only in what they will receive on their first job.

Those who recruit them are interested only in those who are in the top 8 percent of their class. They must come from the best schools, whoever makes those descriptions, and they must I guess have an overwelming desire for pure greed. Because I think greed is overwhelming our profession. I think they are not practicing law, they are practicing money, and that disturbs me.

And, if you are placed on this Court, it will be a delight to see you with your tremendous ability to deal with young people as you have in your law school, in McGeorge, that you can get them back on track as to what it is. And what it is is not to see how many depositions you can Xerox during the discovery proceedings, you know, by the metric ton, or how to make discovery to put your children through college. The first and only rule under Rule 1 of the Rules of Civil Procedure is that the rule shall be construed to secure the just, speedy and inexpensive determination of every action. That is what it says, and it says that in every State rule, under the State rules of civil procedure.

So as we talk about dissecting cases, and that is critically important, we all do that in our law careers, and in theory and philosophizing the issue we are forgetting what has happened to the little guy. He can't even afford a lawyer anymore.

What are your thoughts about that?

Judge KENNEDY. Just to go back one moment——

Senator SIMPSON. Please.

Judge KENNEDY [continuing]. To your first comment, the bar of the ninth circuit and the leaders of the bar in every circuit in the country do work with the courts very, very closely to assist their colleagues in understanding the rule of courts. They have helped us implement rule 11 on sanctions. They sometimes forget, though, the very critical point that the first duty of the lawyer is really to the law. He has an ethical obligation.

The greatest privilege that a lawyer has is counseling a client. I think we all miss that from our practice.

Every lawyer every day acts as a judge, telling his client what the facts are and insisting that his client or her client conforms their conduct to an ethical standard. That is what the law should be about. I am afraid we have lost some of that ideal in the profession, and part of the reason is money.

You can not have it two ways. You can not complain about poor representation and then, on the other hand, complain about the cost of legal services. There is a relation between the two. Law is so complex now that it takes lawyers longer to do the job. What the answer is so far as legal fees are concerned, I don't know. But it is quite true that if a wage-earner, a person in the middle-class is hit with a lawsuit and does not have an insurance company to defend him or her, they are in big, big trouble.

The repeat players in the system and, as I have indicated, including some public interest groups are very adequately represented. But the person that has one brush with the law sometimes has a problem.

Senator SIMPSON. Yes, that is an interesting part of our profession, counseling a real live, human being client who is in extremity usually. Because they have already talked to their spouse and said, "I wonder if I should go get a lawyer," and they think "I don't

think so. Better watch out." Then they go to their brother and then their uncle and finally they walk in to see a lawyer, and they know they are in trouble and they go only in extremity.

You know, that is the way law really is practiced in the world. It is not like here where there are 33,000 lawyers who, if you turn them loose with an anguished and tearful human being, they would hope they could find somebody down in the lower bowels of the office to take care of the poor old soul.

Well, I haven't asked many questions yet, have I? But I have been certainly launching around in them. Another thing though I wanted to—it is so good to hear someone saying that, and be on the Court saying that where you will be heard and have a forum. But, again, take the issue of clubs. You stated your position I thought very clearly. There is a discrimination based on hostility. And then there is a discrimination just based on plain old, you know, indifference, not paying attention. Joining a club and you don't know what is in the by-laws. You just were looking for a place to play squash.

We have been through some remarkable exercises here. We nearly torpedoed a guy because he was a member of the Masons. And everybody sobered up real quick and the word went around that there were about 20 of us in the Masons in the U.S. Senate and 60 or 70 over in the other body, or more than that, and it is really not too sinister an organization. Their tenets there are based on a fierce protection of wife and mother and daughter and son and brother. Probably like the Knights of Columbus in that respect. But we had to go through all that. I mean you really would have been dazzled by that.

And groups that care for the needy, and there is, you know, a secret society that believes in love of fellow man and woman. Interesting.

But the Elks Club now is really getting to be the epitome now. I joined the Elks Lodge in Cody, Wyoming, so I could get a suds on Sunday. That was the original reason. Since then I learned what they did, and their order is based on charity and brotherly love and helping their fellow man. That is what it is. It is not some sinister outfit.

I don't know about the Sutter Club but they must have some purpose. Charity—you know, they actually take Christmas baskets and do little silly things like that in real life in Cody, Wyoming, and help people. Give scholarships to boys and girls.

So, it really is fascinating. I did bring this up and I want to bring it up one more time because we had a group that wrote to us in strident terms during the last hearing, the National Women's Law Center, I believe was the name, in Chicago. There is a forum there of women lawyers. There is not a single man on the letterhead. And they really raised hell with us. And I asked if they had any men members, and they said no. But there wasn't much more to be said about that.

But, you know, come on. You can't have it both ways in this game. You reach the height of absurdity, and that is what gets reached in this exercise.

Well, I will hear from someone on that subject, but it is important to me to know that you have done the human practice of law

for 13 years and apparently with distinction that testimony from your neighbors, Vic Fazio, to hear him speak, I have great regard for him, Bob Matsui, Pete Wilson. Those things are very important to us as we make our decisions.

I understand you have represented minority groups. You were in the Judicial Administration for the Pacific Territories of American Samoa, were you not?

Judge KENNEDY. I am still on that committee, Senator.

Senator SIMPSON. And what is the nature of that work— I have 4 minutes remaining? Wait. Forget it. Don't bother with that. [Laughter.]

You were a member of a union, yourself?

Judge KENNEDY. I am trying to—I believe that I was. I had summer jobs where I did manual labor, usually in the oil fields, but one summer I worked in a lumber mill and I believe I was a member of the Millworkers union. At least I remember paying the money. I do not know if that made me a member or not.

Senator SIMPSON. If you paid money, we will talk to Lane Kirkland. I think you are all right if you paid in. But you are sensitive to those rights of unions and minorities and women and pro bono activity and fairness. Those things have all been forged in you. Would you say that that is a very important thing as you go on to this new duty, which I hope you will?

Judge KENNEDY. No judge comes to the bench as a clean slate and completely free of all compulsions and restraints from his background. Therefore I think the background of a person, his temperament and his character, or her background, temperament and character, are of relevance to your consideration. I have been pleased to make available to you my life so far as I can remember it, Senator.

Senator SIMPSON. Well, we will do that sometime. I would like that. And it has been a real treat to almost watch your cognitive processes as you deal with the issues and the questions presented to you. You handle the inquiry very well, and it is interesting to hear the verbalization of that cognitive process after you churn it, and it comes out in a way that is very understandable. And as I have always said, what good is our whole practice or profession if those we are supposed to serve can't understand what we are doing for them, can't read the lease you prepare, don't understand the will you did, can't understand the property settlement that you drafted. Clarity will save us yet. But I think you are going to be a great advocate of that. Thank you, sir.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. Judge, do you realize how difficult you are making this for Senator Simpson? He spent a whole half hour defending you against charges no one made. [Laughter.]

You know, he is so much in the mode from the last confrontation that I hope that Senator Heflin says something nasty so we get something going here.

Senator SIMPSON. You have been always good with equal time.

The CHAIRMAN. You are the only one I would take the liberty to kid with because I know you have a sense of humor that exceeds mine.

And I want to say one other thing while we are on this. And that is, that things haven't changed all that much, Judge. I remember my first case as a young lawyer in the Court of Common Pleas in New Castle County, Delaware. I was assigned to—I was sent a client who was accused of driving under the influence, and my first thing that I did was to go in and to ask for a continuance.

And, as I stood there waiting in line, a fellow named Switch Di Stefano, God bless him, the clerk of the court, turned to Judge Gallo and he said, and I could hear him say, "Ask him if rule 1 has been complied with?"

And he asked me, and I looked and I panicked. I thought I knew what rule 1 was but I couldn't see how it related to this. And I said, "Your Honor, I am embarrassed. I am not sure what rule 1 is."

They called me to the bench and Switch Di Stefano leaned over and he said, "Before we grant the continuance, have you gotten the fee?" [Laughter.]

I am sure that never happened in your life, Judge, but it happened in mine. And I want to yield now to the Senator from Alabama.

Senator HEFLIN. Judge Kennedy, have you found the teaching of law while being a judge rewarding?

Judge KENNEDY. I have to say since I am under oath that teaching is the most enjoyable day of my week. I love it.

Senator HEFLIN. Would you plan if you go to the Supreme Court to do some teaching, too, on the side?

Judge KENNEDY. From what I hear about the workload, I think the answer must be no, Senator.

Senator HEFLIN. Does teaching cause any problems with predetermination of issues?

Judge KENNEDY. I fear that if I were appointed to the Supreme Court that it might. In the ninth circuit there would be maybe two or three times a year in which I would get a little close to a case that was before me, and so I thought I would stay away from it. But you know what the usual drill is. You simply ask the student the question and then you take the opposite side.

I always made it clear to my students that I did not care what they thought but I did care passionately how they came to that conclusion, within certain broad limits of tolerance, of course.

Senator HEFLIN. In the case of *U.S.* v. *Alberto Antonio Leon*, which is now a famous case—and was heard by the Supreme Court—you dissented from the opinion of the ninth circuit and you closed your dissent with this language:

> Whatever the merits of the exclusionary rule its rigidities become compounded unacceptably when courts presume innocent conduct when the only common sense explanation for it is ongoing criminal activity. I would reverse the order suppressing the evidence.

Now I would assume as a teacher after the Supreme Court decided the *Leon* case, you and your students discussed this decision and also your dissent in the ninth circuit's decision. Did that occur?

Judge KENNEDY. Well, Senator, the constitutional law course as it is now composed no longer includes criminal procedure, so I was not able to discuss that with my students. As you have indicated, I get somewhat, at least by inference, more credit for the *Leon* case

than I deserve, because I did not find that there had been an illegal search in that case.

Senator HEFLIN. You looked at the conduct and felt it was continuous conduct and therefore that the information was adequate for the warrant, but you did use the word "good faith" in one aspect——

Judge KENNEDY. Yes, sir.

Senator HEFLIN. So you at least have some claim for that. You also mentioned the rigidities of the exclusionary rule. Do you see in other areas, say in warrantless cases, that the good faith exception could be applied?

Judge KENNEDY. I was on a panel and authored the decision in a case called the *United States* v. *Peterson* in which drug enforcement agents relied on the statement of Philippine law officials for the proposition that they could tap a telephone.

They interdicted a ship some 100 miles off the coast of California with a huge volume of illegal drugs on it. We held that the good faith exclusionary rule applied in the circumstances on the theory that the officers acted reasonably in relying on the assurances of their foreign counterparts. So I have addressed that issue. There was no warrant there.

Whether or not it should apply to warrantless searches in the United States is a question that I have not addressed, and I would want to consider very deliberately whether or not the rule should be extended to those instances because you then get, as you know, into the problem of objective versus subjective bad faith. You must be very careful to ensure that by the exception you do not swallow the rule.

Senator HEFLIN. Now let me ask you about the interpretation of the freedom of religion and the Establishment Clause. Over the past several years many have accused the Supreme Court of interpreting the Establishment Clause in an overly expansive manner. You are quoted in a 1968 interview with McGeorge School of Law newspaper as saying that the Court should leave room for some expressions of religion in State-operated places. There should be a place for some religious experience in schools or a Christmas tree in a public housing center.

Now, without speaking to any specific case, can you elaborate a little on your thoughts pertaining to this issue?

Judge KENNEDY. I can not recall that article or that interview. I saw another article about it just yesterday or the day before. I would say that the law would be an impoverished subject if my views did not change over 20 years.

As I understand the Establishment Clause doctrine, the Court has a very difficult problem because, as you know, the Establishment Clause, which tells us that the Government should not aid or assist religion, in some senses works at cross purposes with the free exercise clause. The classic example is the furnishing of a chaplain to the military. If the Government furnishes the chaplain, it is in a sense assisting religion. If it does not it is denying soldiers whose conduct is completely controlled by their officers the free exercise of their religion. So the clauses sometimes point in different directions.

Now, the test the Supreme Court has for Establishment Clause cases is whether or not the particular legislation or governmental program adopted has the purpose or the effect of aiding religion or of hurting religion and whether or not there is a forbidden entanglement of religion. The Court is struggling with that test on a case-by-case basis. The decisions are difficult to reconcile, Senator.

In this area more than in almost any other one the Court has relied on the historic practices of the people of the United States, and has found in history a guide to a decision. In that respect in this area history has been helpful to the Supreme Court. It seems to me that that is an appropriate reference in those cases.

Where I would draw the line in any given case is a question that I have not addressed in my circuit decisions so far. I have no really fixed views on the subject other than to say that the framers were very careful about this. Many of the framers were religious people, but they were careful not to allow that to enter into the debates in the Constitutional Convention.

Madison was very concerned about religious intolerance and so when Alexander Hamilton asked for the protection of contracts, Madison asked that the test oath clause be put in the main body of the Constitution. The main body of the Constitution contains religious protection and the framers were very, very conscious of this. It is a fundamental value of the Constitution of the United States that the Government does not impermissibly assist or aid all religions or any one religion over the other.

Senator HEFLIN. Going to another subject, media reports have indicated that your relationship with President Reagan came as a result of your assistance in writing proposition No. 1, which was a tax limitation measure. Would you tell us about your circumstances in relationship to now Attorney General Edwin Meese and now President Ronald Reagan when he was Governor and the circumstances concerning that?

Judge KENNEDY. In those halcyon days, Senator, when our current President was Governor of the State of California and Edwin Meese, I suppose his executive secretary, I am not sure exactly of the title, the Governor's administration concluded that it was time to propose to the people of the State of California an amendment which would limit the spending of the government of the State of California. It was a rather complex proposal designed to impose a spending limit. It was hoped that tax reform would follow from that. The spending limit was based on a percentage of the total gross product for the State of California, and the permitted spending, expressed as a percentage, was to decline each year. It was a highly complex measure.

The Governor at the time believed very strongly that the citizens of the State of California should be able to control their government. He and Mr. Meese asked if I would be the draftsman for this complex proposal. One of the reasons the proposal failed of adoption, I am told, is it was too difficult for people to understand. I understood it, but it was an exceptionally complex document. It was very interesting to work on.

Senator HEFLIN. Well, your judicial writings have improved.

Judge KENNEDY. Well, thank you.

Senator HEFLIN. In this Canadian Institute speech you deal with unenumerated rights, and in that speech you state that most rights in the Constitution are enforced as negatives or prohibitions, not affirmative grants, and you list as examples, Congress shall make no law respecting the establishment of religion, no warrant shall issue but upon probable cause, or nor shall any State deprive any person of life, liberty or property without due process of law.

You seem to view these prohibitions in the Constitution as limiting the expansion of judicial power. Are they also, though, a means of preventing government from denying individuals their fundamental rights?

Judge KENNEDY. I would agree that they certainly are, Senator. And in the negative form they are easily understood well, not always easily enforced, but I think easily understood.

Senator HEFLIN. In Judge Bork's hearing, I think we questioned him for a long time before we finally got around to asking him about *Roe* v. *Wade*. I suppose if there is any one issue, that issue is probably within the spotlight the most.

He answered by saying that his position relative to reviewing *Roe* v. *Wade*, if it came up for a review and if he was on the Supreme Court, would be directed in three different areas. One is looking to the Constitution to find whether or not there was any specific authorization for an abortion; second, whether or not he could find a general right of privacy by which he would base a decision relative to *Roe* v. *Wade;* and, third, stare decisis.

There was no question that he had been quoted as saying that that decision was a unsatisfactory decision of the U.S. Supreme Court. He had previously been quoted and he admitted that he thought it was a wrong decision, and that he thought that the reasoning of the decision was defective.

He outlined, not in specific terms the criteria that he would use, but in general terms the criteria that he would review relative to stare decisis. In all fairness I think the American people would like for you to give an expression pertaining to that case, your views, how you would approach, without specifying how you might hold, but how you would review and how you would approach that issue.

Judge KENNEDY. In any case, Senator, the role of the judge is to approach the subject with an open mind, to listen to the counsel, to look at the facts of the particular case, to see what the injury is, see what the hurt is, to see what the claim is, and then to listen to his or her colleagues, and then to research the law. What does the most recent precedent, the precedent that is before the Court if it is being examined for a possible overruling, and what does that precedent say? What is its logic? What is its reasoning? What has been its acceptance by the lower courts? Has the rule proven to be workable? Does the rule fit with what the judge deems to be the purpose of the Constitution as we have understood it over the last 200 years? History is tremendously important in this regard.

Now, as you well appreciate, and as you certainly know, Senator, stare decisis is not an automatic mechanism. We do not just pull a stare decisis lever or not pull it in any particular case. Stare decisis is really a description of the whole judicial process that proceeds on a case-by-case basis as judges slowly and deliberately decide the facts of a particular case and hope their decision yields a general

principle that may be of assistance to themselves and to later courts.

Stare decisis ensures impartiality. That is one of its principal uses. It ensures that from case to case, from judge to judge, from age to age, the law will have a stability that the people can understand and rely upon, that judges can understand and rely upon, and that attorneys can understand and rely upon. That is a very, very important part of the system.

Now there have been discussions that stare decisis should not apply as rigidly in the constitutional area as in other areas. The argument for that is that there is no other overruling body in the constitutional area. In a stare decisis problem involving a nonconstitutional case, the Senate and the House of Representatives can tell us we are wrong by passing a bill. That can not happen in the constitutional case.

On the other hand, it seems to me that when judges have announced that a particular rule is found in the Constitution, it is entitled to very great weight. The Court does two things: it interprets history and it makes history. It has got to keep those two roles separate. Stare decisis helps it to do that.

Senator HEFLIN. Let me ask you about the death penalty. If you believe that the death penalty is constitutional, and some of the speeches you have made indicate that you believe that it is, what safeguards do you think are necessary to prevent the use of the death penalty in a discriminatory manner?

Judge KENNEDY. I, at the outset, Senator, would like to underscore that I have not committed myself as to the constitutionality of the death penalty. I have stated that if it is found to be constitutional it should be enforced.

With reference to its being used in a discriminatory manner, there are at least two safeguards. The first is that the legislature itself defines the category of crimes that deserve the ultimate punishment. The second is that courts develop, articulate, and pronounce rules for instructions to the jury so that the jury's decision is properly channeled. You know better than I because of your experience in the trial courts, Senator, the tremendous power of that jury. Juries simply must be given clear guidelines so that they can apply the death penalty on a consistent basis.

It is not clear to me that under the existing law that requisite has been satisfied in some of the cases that I have reviewed. On the other hand, I recognize the difficulty in formulating these standards that I so blithely recommend.

Senator HEFLIN. In 1980, you gave a speech in Salzburg, Austria, which focused on the power of the Presidency. In that speech you stated:

> I think that the accepted view is that while Congress can instruct the President in most matters there are some inherent powers in the office exercisable in an emergency but their nature and extent are still not fully understood. These answers must wait an evolutionary process in the continuing traditions of the Presidency. My position has always been that as to some fundamental constitutional questions it is best not to insist on definitive answers. The constitutional system works best if there remains twilight zones of uncertainty and tensions between the component parts of the government. The surest protection of constitutional rule lies not in definitive announcements or power boundaries but in a mutual respect and deference

among all the component parts. This furthers recognition of the need to preserve a working balance.

Would you elaborate on the inherent powers you believe might be exercisable by the President in an emergency?

Judge KENNEDY. As you know, Senator, if you look at article II of the Constitution, it is much different in style than article I.

Article I, which specifies the powers of the legislative branch, is quite detailed. Article II is not. It is almost as if it were written by different people. It was not, but it looks that way.

It is a text in which you have to isolate phrases in order to pick out what the President's powers are. The President's power is to exercise the executive power; that is the way article II begins; he has the powers of the commander in chief; he has the power of appointment, the power to receive ambassadors, and the duty faithfully to execute the law. Duty has translated to power by the tradition of the office. I am not quite sure how that happened.

Youngstown Sheet and Tube tells us, or it begins to discuss, the critical question, whether or not the President is simply the agent of Congress, bound to do its bidding in all instances, or whether or not there is a core of power that lies at the center of the presidential office that the Congress cannot take away.

As I understand current doctrine, and the *Youngstown* case, there is that core of power. The extent to which it can be exercised in defiance of the congressional will is a question of abiding concern, I know, to the Congress and to the judges.

My point in those remarks was that these power zones are perhaps best defined as each branch accommodates the other, and expresses deference to the legitimate concerns of the other branch.

The history of the development of the presidency has been one of evolution. One suggestion given for the different textual treatment in article II was that the framers knew that Washington would be the president. They trusted him, indicating that the framers thought there would be an evolutionary component to the presidency as it evolved.

The extent to which the presidency can be controlled by the courts is not yet clear. We know that in the *Youngstown* case, where the president seized the steel mills, and in the *Nixon* tapes case, where the President was ordered to turn the tapes over to the prosecutor, there was immediate compliance by the president with the mandate of the Court.

To date, the court's authority to review the acts of the president has not been questioned by the president. Lincoln questioned the authority, because of the necessity of the Civil War.

Whether or not the courts are the appropriate body for the reconciliation of all of the disputes between the political branches of the government is a question as to which I have some doubt. In some disputes, it may be unclear there is a case and controversy which the courts can adequately and meaningfully interpret consistent with the case-by-case method.

Senator HEFLIN. Have you expressed in your opinions or speeches or statements a position on congressional standing?

Judge KENNEDY. No, sir, I have not. It has been an issue that has arisen principally in the District of Columbia circuit. It is an issue on which I have not expressed myself, and have no particular fixed

views, other than, as I have indicated, to state that one of the reasons for a case and controversy requirement is to recognize the limitations of the judicial office.

When President Truman seized the steel mills, this was an act that took place at a fixed time. It was like a taking under the fifth amendment. It was something that the court could very manageably work with. And they gave an important pronouncement in that case.

It is a case that still has puzzles to it, but it is one of the leading cases on presidential power. That was a circumstance that had fixed boundaries, both as to time and to space, and the actions of the participants involved. That is the kind of case that the court can very manageably undertake.

Senator HEFLIN. Thank you, Mr. Chairman. My time is up.

Senator KENNEDY. The Senator from Iowa.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Kennedy, during the committee's consideration of Supreme Court nominees over the past several months, it has been asserted several times by different people that one of the jobs of a judge is to find and create rights which are not in fact mentioned in the Constitution, but which the Judge might deem to be very "fundamental." Fundamental in terms of the mind of the judge and the judge's own abstract moral philosophy.

Do you see any dangers with such an undefined standard as a foundation for constitutional analysis? In other words, how confident can we be that judges, fallible human beings as they are, will exercise that mighty power appropriately?

Judge KENNEDY. I am not sure how you can be satisfied that a judge will not overstep the Constitutional bounds. What you must do is, number one, examine the judge's record; document his or her qualifications and commitment to constitutional rule.

As I think Mr. Justice Jackson said, judges are not there because they are infallible; they are infallible because they are there.

I think that comment is somewhat inappropriate. I do not think judges think of themselves as infallible at any point. Certainly the history of the Supreme Court in which the Court has been willing to recognize its errors and to overrule its decisions, indicates that the justices take very conscientiously their duty to interpret the Constitution in the appropriate way.

Senator GRASSLEY. If we do not recognize the dangers of judges using undefined standards, aren't we doomed to end up with a small group of unelected, unrepresentative judges making the law in this country?

Judge KENNEDY. That, Senator, is one of the great concerns of any scholar of the Constitution. This is not the aristocracy of the robe.

Judges are not to make laws; they are to enforce the laws. This is particularly true with reference to the Constitution.

The judges must be bound by some neutral, definable, measurable standard in their interpretation of the Constitution.

Senator GRASSLEY. Judge Kennedy, you stated in an August 1987 speech before the Ninth Circuit Judicial Conference that there are two limitations on judicial power. I hope I interpret the speech correctly.

The first limitation is that the Constitution is a written law to which courts are bound when announcing constitutional doctrine.

As you know, Judge Kennedy, the Bill of Rights and many later amendments are phrased in broad, spacious terms. If a judge were so inclined, he or she could expand the interpretation, use, and effect of many provisions of the Constitution.

And I believe you to be an advocate of judicial restraint. As Chief Justice Marshall emphasized in *Marbury* v. *Madison*, judges have a duty to respect constitutional restraints.

How do you apply the words of the Constitution to problems that the framers could not have foreseen?

Judge KENNEDY. The framers, because they wrote a constitution, I think well understood that it was to apply to exigencies and circumstances and perhaps even crises that they could never foresee.

So any theory which is predicated on the intent the framers had what they actually thought about, is just not helpful.

Then you can go one step further on the progression and ask, well, should we decide the problem as if the framers had thought about it? But that does not seem to me to be very helpful either.

What I do think is that we can follow the intention of the framers in a different sense. They did do something. They made certain public acts. They wrote. They used particular words. They wanted those words to be followed.

We can see from history more clearly now, I think, what the framers intended, than if we were sitting back in 1789. I made that discovery when I gave the speech to the Canadian judges.

They had just written a constitution 2 or 3 years ago. They knew the draftsmen. And yet, they were, it seemed to me, more at sea as to what it meant than we were in interpreting our own Constitution.

We have a great benefit, Senator, in that we have had 200 years of history. History is not irrelevant. History teaches us that the framers had some very specific ideas.

As we move further away from the framers, their ideas seem almost more pure, more clarified, more divorced from the partisan politics of their time than before.

So a study of the intentions and the purposes and the statements and the ideas of the framers, it seems to me, is a necessary starting point for any constitutional decision.

Senator GRASSLEY. Is there any room for a judge to apply his or her own values and beliefs for the purpose of interpreting the text of the Constitution?

Judge KENNEDY. The judge must constantly be on guard against letting his or her biases or prejudices or affections enter into the judicial process.

Senator GRASSLEY. Well, what other factors are there which can affect a judge's interpretation of the text of the Constitution?

Can these factors be determined and applied without involving the personal bias of the judge?

Judge KENNEDY. The whole idea of judicial independence, the whole reason that judges are not accountable to the Congress once they're confirmed, other than for misbehavior, the whole theory is that the judge is impartial; that he will apply a law, or that she

will apply a law, that is higher than themselves. It is higher than their own particular predilections.

Senator GRASSLEY. I do not disagree, but I do not know to what extent you mentioned other factors that can come into play to affect a judge's interpretation of the text of the Constitution?

Judge KENNEDY. When a judge hears a constitutional case, a judge gets an understanding of the Constitution from many sources: from arguments of counsel; from the nature of the injuries and the claims asserted by the particular person; and from the reading of the precedents of the court, and the writings of those who studied the Constitution.

All of these factors are, in essence, voices through which the Constitution is being heard.

But the idea is that the Constitution is itself a law. It is a document that must be followed.

Senator GRASSLEY. You described yourself in a February, 1984 speech before the Sacramento Rotary Club as a "judicial conservative."

Does this mean that you are in any way adverse to evolving interpretations of the Constitution that accommodate new technology or current trends in society?

Judge KENNEDY. A conservative recognizes that any State must contain within it the ability to change in order to preserve those values that a conservative deems essential.

As applied to a judge, I think that is consistent with the idea that constitutional values are intended to endure from generation to generation and from age to age.

Senator GRASSLEY. In that August, 1987 speech before the Ninth Circuit Judicial Conference—which I previously mentioned—you stated that the doctrine of original intent is best conceived of as an "objective" rather than a "methodology."

I would like to have you explain the difference between using the doctrine of original intent as an "objective," and using it as a "methodology"; and why that is a better practice?

Judge KENNEDY. I think what I had in mind there was to indicate that the doctrine of original intent is not necessarily helpful as a way to proceed in evaluating a case; but that really it is one of the things that we want to know.

The doctrine of original intent does not tell us how to decide a case. Intention, though, is one of the objectives of our inquiry.

If we know what the framers intended in the broad sense that I have described, then we have a key to the meaning of the document.

I just did not think that original intent was very helpful as a methodology, as a way of proceeding, because it just restates the question.

Senator GRASSLEY. Well, when the objective of original intent is not met, do you reevaluate your result and underlying analysis? Or do you accept the result despite not obtaining the objective?

Judge KENNEDY. Let me see if I—if you cannot find the original intent, is that your point?

Senator GRASSLEY. Yes, when the objective of original intent is not met.

Judge KENNEDY. Is not met?

Senator GRASSLEY. Yes.

Judge KENNEDY. Original intent, broadly conceived as I have described it, is extant in far more cases than we give it credit for.

I think that in very many cases, the ideas, the values, the principles, the rules set forth by the framers, are a guide to the decision. And I think they are a guide that is sufficiently sure that the public and the people accept the decisions of the court as being valid for that reason.

If there is not some historical link to the ideas of the framers, then the constitutional decision, it seems to me, is in some doubt.

Senator GRASSLEY. Well, in your role as a judge—and I do not question your statement that original intent is more often met than we may realize—but if it is not met, do you then at that point reevaluate your result and underlying analysis?

Or do you accept the result, despite not attaining the objective?

Judge KENNEDY. Well, I do not wish to resist your line of questioning, because I think it is very important; it goes to the judicial method.

But I think that in almost all cases there is an intent, at least broadly stated; the question is whether it is narrow enough to decide the particular case.

It is, I think, an imperative that a judge who announces a constitutional rule be quite confident, be quite confident, that it has an adequate basis in our system of constitutional rule; and that means an adequate basis in the intention of the Constitution.

Senator GRASSLEY. Over the past few months, it has been suggested that the broad and spacious terms of the Constitution are best utilized by the courts to relieve the political branches of their responsibility to determine what some might consider to be the attributes of a just society.

What is your opinion of the current perception in our society that only the courts, rather than the political branches of government, should address constitutional problems?

Judge KENNEDY. I resist that idea as a proper constitutional approach. In my view, it is the duty of the legislative and of the executive to act in a constitutional manner, and to make a constitutional judgment as to the validity of each and every one of their actions.

We have a rule in the courts that we presume that a statute is constitutional. If the legislature says, well, it is simply up to the courts, the basis for that presumption is not there. If the legislature does not take the responsibility of making a constitutional determination that its actions are justified, then the presumption of constitutionality should be destroyed. I do not think that would be consistent with our political system.

Senator GRASSLEY. Judge Kennedy, do you believe that one of the consequences of this deference to the judicial branch that I have just described is the judicial activism the Supreme Court has practiced over the last 20 or 30 years, and that a good way to alleviate this problem would be for the Court to begin practicing a greater degree of judicial restraint?

Judge KENNEDY. I think judicial restraint is important in any era It is especially important if the political branches for some

reason think that they can delegate or have delegated the power to make constitutional decisions entirely to the courts.

Senator GRASSLEY. Your answer is yes, then?

Judge KENNEDY. Yes.

Senator GRASSLEY. Judge, I am sure that you will agree with me, that there have been many unpopular, and in many cases, even "bad" laws enacted in the history of our country.

However, many of these laws, no matter how unpopular, were, or are, constitutional. What is the court's role when faced with a bad or unpopular law which is nonetheless constitutional?

Judge KENNEDY. It is very clear. The court's role is to sustain and to enforce that law.

Senator GRASSLEY. Is it your judgment, then, that it is the responsibility of the political branches of government to deal with an unpopular law?

Judge KENNEDY. Absolutely, Senator. The essence of the democratic process is that the legislature protects citizens against unjust laws, and acts promptly to repeal them.

Senator GRASSLEY. Do you think it is within the jurisdiction of the Court to address these laws, or is this an example of what you called, in your July 1986 address to the Canadian Institute for Advanced Legal Studies the "unrestrained exercise of judicial power"?

Judge KENNEDY. If a law is wrong-headed, or a bad, or an ill-conceived law, but is nevertheless constitutional, the court has no choice but to enforce it.

Senator GRASSLEY. What exactly is—using your words—the "unrestrained exercise of judicial power"?

Judge KENNEDY. The unrestrained exercise of judicial power is to declare laws unconstitutional merely because of a disagreement with their wisdom.

Senator GRASSLEY. The second limitation of judicial power which you discussed in your August 1987 speech before the Ninth Circuit Judicial Conference is the constitutional requirement of "case or controversy." Correct?

Judge KENNEDY. Yes.

Senator GRASSLEY. However, you suggested that this requirement is not as effective as it once was. Why do you think that this is so?

In other words, how did you come to this conclusion?

Judge KENNEDY. The underpinning for the doctrine of *Marbury* v. *Madison* is that the court pronounces on the Constitution because it has no other choice. It is faced with a case, and it must decide the case one way or the other. It cannot avoid that responsibility, and so the constitutional question is necessarily presented to it. Chief Justice Marshall says that very clearly. He said we do not have the responsibility, or the institutional capability, or the constitutional obligation, to pronounce on the Constitution, except as we must in order to decide a case.

Now I had long thought that the case or controversy requirement therefore was an important limit on the court's jurisdiction. The court would not decide cases or issues that should be properly addressed by the political branches in the first instance.

But the case or controversy rules are changing. The Court has relaxed rules of standing in some of its own decisions. The Congress has done the same. We have class actions. We have remedial

relief. Courts have entered the 20th century in order to make their judgments efficient, which they must do, and their systems efficient, which they must do.

All of this has meant that what was once a selection process has now really diminished in its importance and its significance. The courts are more and more confronted with cases that involve the great, current public issues of our time.

Therefore, judicial restraint is all the more an imperative.

Senator GRASSLEY. Could it in any way be said that part of the blame for the ineffectiveness of the "case or controversy" requirement must lie with Congress and its historic deference towards regulating the courts?

In other words, should Congress consider removing federal court jurisdiction over certain controversies?

Judge KENNEDY. Well, that is a very delicate question, Senator. The authority of the Congress to reduce the jurisdiction of the federal courts in a particular class of cases presents a very difficult, and, I think, a significant constitutional question.

It presents a question that goes perhaps to the verge of the congressional power. Before the Congress would enact such a rule, I would submit that it would have to have the most serious and the most compelling of reasons, and even after that any such attempt would present a serious constitutional issue for the Court itself to decide.

Senator GRASSLEY. Well, should the Supreme Court try to find some way to make more effective the "case or controversy" requirement?

Judge KENNEDY. Case or controversy is requisite in the Constitution and I agree that the Court should be very, very careful to insure that that requirement is met in every case, and I think it should pay very, very close attention to that.

Senator GRASSLEY. I was asking my question based upon your statement that in modern times there have been ways of getting around the "case or controversy" requirement; that it is not as effective as it once was.

Is there some answer here? I sense that you seem to feel that this is an area in which Congress ought not to operate in, or at least you seem to indicate that it is a very controversial area. I think you have indicated that there is a problem; is there some answer to the problem?

Judge KENNEDY. I may also have misinterpreted your earlier question. Congress certainly can relax the rules of standing, or tighten the rules of standing, in order to give more content to the case or controversy rule without——

Senator GRASSLEY. Well, of course Congress has had some deference toward regulating the courts to any great extent.

Judge KENNEDY. Yes.

Senator GRASSLEY. Would it be unfair to say that another reason for the failure of the "case or controversy" requirement is the philosophy of judicial activism which the Court has applied over the last 20 or 30 years? In other words, because the Court has so often extended its holdings to issues not directly presented in the cases before it, do you think litigants and attorneys are more inclined to

go to court with attenuated, rather than direct, injuries, expecting relief, nonetheless?

Judge KENNEDY. I would not quarrel with that characterization. I might be a little bit hard-put to give you a specific example, but there seems to be a thrust in favor of the courts reaching out to decide the issues.

Senator GRASSLEY. The previous nominee before this committee to fill this vacancy on the Supreme Court was a strong advocate of the belief that rationale was more important than results.

He criticized what he called result-oriented jurisprudence in which the rationale was made secondary to the actual result reached.

He was admittedly taken to task for his position on this matter, especially before this committee.

What is your position regarding this so-called result-oriented jurisprudence, and when, if ever, is it justified?

Judge KENNEDY. I think if a judge decides a case because he or she is committed to a result, it destroys confidence in the legal system.

Senators and Representatives are completely free to vote for a particular bill because it favors labor, or because it favors business. That is the way politics works, and that is your prerogative. To identify such an interest, it seems to me, is very candid.

That is improper for a court. The court must base its decision on neutral principles applicable to all parties. That is inconsistent, in my view, with deciding a case because it reaches a particular result.

Now we all know that the way we make our judgments in everyday life is to look quickly at a result and act accordingly if the result seems instinctively correct.

I think sometimes judges do that initially when they hear a case. They say well, this case is just wrong, or this case is just right. But the point of the judicial method is that after the judge identifies the result, he or she must go back and make sure that that result is reachable because the law requires the result, and not otherwise.

Senator GRASSLEY. I think I liked the first half of your answer. On the second half, are you in the middle between "results" versus "rationale"?

Judge KENNEDY. I insist that a result is irrelevant. I just have to tell you that many judges have an instinctive feeling for a case, and sometimes you reason backwards.

Sometimes you say the case ought to come out this way and you begin to write it, and to prepare an opinion for your colleagues, and it just is not working, and then you know that the result is wrong.

That is the nature of the judicial method. That is why we write. We do not write because it is easy to read, or because we think people enjoy reading it. We write because it is a discipline on our own process.

Senator GRASSLEY. Judge, as we become more familiar with you and as we study those opinions that you have written, I sense that you are very adept at addressing the narrow question at hand without expanding into unnecessary discussions of the law.

Can you think of any situation where it is appropriate for a Supreme Court Justice to depart from the issue at hand, and announce broad, sweeping constitutional doctrine?

Judge KENNEDY. I think that the constitutional doctrine that is announced should be no broader than necessary to decide the case at hand.

I do have to tell you this, Senator, and it was touched on earlier. When the Supreme Court has only 150 cases a year, and it is charged with the responsibility of supervising the lower courts, it has to write with a somewhat broader brush, in order to indicate what its reasons are.

This does not mean, however, that it is free to go beyond the facts of the particular case, or that it is free to embellish upon the constitutional standard.

Senator GRASSLEY. Mr. Chairman, thank you. Judge Kennedy, thank you.

Judge KENNEDY. Thank you, sir.

The CHAIRMAN. Thank you. Judge, we do not have time to get another round in and keep the commitment to get out of here by 6 which I told my colleagues, and we have four Senators who have yet to ask a first round. I do not know how many will have a second.

Judge, would you mind coming in at 9:30 tomorrow instead of 10, so we can start a little bit earlier?

Judge KENNEDY. Not at all. I am here at the pleasure of the committee, Senator.

The CHAIRMAN. All right. Why don't we start at 9:30. We will probably start with Senator Specter at 9:30 and Senator Metzenbaum at 10, unless Senator Metzenbaum is here, and we would alternate. But otherwise, I had told him he would probably start at 10, and I do not know whether he will be able to be back by 9:30. I do not know if he will get the message.

So if you are prepared to go at 9:30, or at 10:00, if not 9:30, 10 o'clock would be the time we would start.

Senator SPECTER. That is fine, Mr. Chairman. I very much appreciate that.

The CHAIRMAN. And Judge, I appreciate your being so forthcoming today and we look forward to another day, and it is my hope that tomorrow we can finish with your testimony.

I know several Senators will have a second round of questions, and we will plan on going from 9:30 until noon, and break for an hour again, and hopefully go until we finish, and then Wednesday morning begin the public witnesses with, if all goes well, with the American Bar Association, Judge Tyler coming before the committee with the recommendation of the ABA.

The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman. I just want to say that Judge Kennedy has handled himself in an exemplary manner, and I feel that we stand a chance that we might be able to finish his testimony tomorrow.

The CHAIRMAN. The best measure of how exemplary the manner is, is every Senator who has spoken so far has indicated they do not fully agree with you. You have a lot going for you.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. Seriously, Judge, I appreciate you being so forthcoming.

The hearing will recess until tomorrow at 9:30.

[Whereupon, at 5:40 p.m., the committee adjourned, subject to the call of the Chair.]

NOMINATION OF ANTHONY M. KENNEDY TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, DECEMBER 15, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr., chairman of the committee, presiding.

Also present. Senators Kennedy, Metzenbaum, Leahy, Heflin, Thurmond, Hatch, Grassley, Specter, and Humphrey.

The CHAIRMAN. What I would like to know before we begin, Mr. Kennedy, is: Did Senator Metzenbaum tell you about the candy barrel in his office?

Senator METZENBAUM. The candy is very good.

The CHAIRMAN. We are delighted to have you back, Judge. In this town, as you know, there are instant reviews and instant analyses, and I observed last night and this morning what I observed when you were here: that everyone thinks you did well. I want to admit I share that opinion.

Judge KENNEDY. Thank you, Senator.

The CHAIRMAN. Notwithstanding the Wall Street Journal's editorials.

Senator Metzenbaum is next to speak, but he has been gracious enough to accommodate Senator Specter's schedule. He has a meeting at the White House at 10:30. So what we will do, once again——

Senator METZENBAUM. If the Chair would yield for a question?

The CHAIRMAN. I would be delighted to.

Senator METZENBAUM. The news reports within the last hour have indicated that one of the former contenders for the Democratic nomination is about to re-enter the race and has called a press conference for today at noon. Do you have any plans to call a press conference for tomorrow at noon?

The CHAIRMAN. No, but——

Senator LEAHY. We just want to be able to schedule, Mr. Chairman. That is all it is.

The CHAIRMAN. It will be today at 3. [Laughter.]

Senator LEAHY. Mr. Chairman, could I ask a serious question?

The CHAIRMAN. You mean that is not serious? [Laughter.]

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Senator LEAHY. No, I was very serious, but you have already answered 3 o'clock. I will go to the gym during that time. No, actually, I would be at the press conference, Mr. Chairman.

Senator Specter is going to go next, then Senator Metzenbaum. Just so that I can plan, I am perfectly free, whatever you want to do, would I then be after Senator Metzenbaum on questioning?

The CHAIRMAN. The answer is yes, you would.

Senator LEAHY. That would put us back into the sequence.

The CHAIRMAN. Yes, you would. I hope that Senator Humphrey is listening—I do not mean that facetiously—so we do not get into a discussion about two Democrats in a row, et cetera. What we will do, the order will be as follows: The Senator from Pennsylvania, the Senator from Ohio, the Senator from Vermont, the Senator from New Hampshire, the Senator from Alabama—no, you already asked questions, as a matter of fact, yesterday, if I am not mistaken—the Senator from Illinois, who will be at the Hart press conference, and then back to me and to the ranking member.

With that, are you not really fascinated by all this, Judge?

Judge KENNEDY. It is more interesting than some of my sessions, Senator.

The CHAIRMAN. We will now begin with the Senator from Pennsylvania who will question for his first round for half an hour.

Senator SPECTER. Thank you, Mr. Chairman, and I thank my colleague, Senator Metzenbaum, for yielding at this time.

Judge Kennedy, as already indicated, I am going to have to depart after my round. We have a meeting on the Strategic Defense Initiative and the INF treaty. We will be following through staff and listening on the radio as I drive away.

Judge KENNEDY. Thank you, Senator. I certainly understand.

Senator SPECTER. Judge Kennedy, I would like to begin with exploring the legal theories that run through your writings and through your decisions: original intent, interpretivism, legal realism, result-oriented—all subjects which you have addressed and matters which have been referred to, to some extent, in yesterday's session.

I start with a comment which you made this year at the Ninth Circuit Conference where you say, "There must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers."

In a speech which you made in 1978 to the judges of the ninth circuit, you have identified three cases—*Brown* v. *Board of Education*, *Baker* v. *Carr*, *Gideon* v. *Wainwright*—where you noted and reminded the audience that it was not the political branches which decided those cases. And in the context of *Baker* v. *Carr*, you referred to the fact that the court has wrought the revolution of *Baker* v. *Carr*. You had picked out these three cases as being distinctive matters of judicial interpretation. I would like to begin with *Brown* v. *Board of Education*, the desegregation case.

In examining the issue of framers' intent, I refer to the treatise by Raoul Berger, a noted constitutional authority, who set the factual circumstances at the time the Equal Protection Clause of the 14th amendment was adopted in this context. And at page 118 in Professor Berger's book, "Government By Judiciary," he points out

that Congressman Wilson, the sponsor in the House of the 14th amendment, stated, "Civil rights do not mean that all citizens shall sit on juries or that their children shall attend the same schools." Later at page 123, Professor Berger goes on to point out that at the time the 14th amendment was adopted, eight Northern States provided for separate segregated schools; five States outside the Old Confederacy, either directly or by implication, excluded black children entirely from their public schools; and that Congress had permitted segregated schools in the District of Columbia from 1864 onward. Then Professor Berger notes, at page 125, that even the Senate gallery itself was segregated at that time.

Now, my question is: Is it ever appropriate for the Supreme Court of the United States to decide a case at variance with the framers' intent?

Judge KENNEDY. Well, in answering that question, let me say that implicit in your introduction was the proposition that it was not the framers' intent to forbid segregation in schools, and I think Professor Berger has 180 degrees the wrong slant on that point. He defines intent in a very narrow way. He defines intent to mean what the framers, as he calls them, actually thought.

I think that is irrelevant. What is important are the public acts that accompanied the ratification of, in this case, the 14th amendment. Remember that the framers are not the sole repository from which we discover the necessary intention and the necessary purpose. In the legislature we do not ask what the staff person thought when he or she wrote the bill, we ask what the Senators thought.

And so with the Constitution. It is what the legislatures thought they were doing and intended and said when they ratified these amendments.

The whole lesson of our constitutional experience has been that a people can rise above its own injustice, that a people can rise above the inequities that prevail at a particular time. The framers of the Constitution originally, in 1789, knew that they did not live in a perfect society, but they promulgated the Constitution anyway. They were willing to be bound by its consequences.

In my view, the 14th amendment was intended to eliminate discrimination in public facilities on the day that it was passed because that is the necessary meaning of the actions that were taken and of the announcements that were made. You can read the abolitionist writings that were the precursor to so much of the 14th amendment. So, that, as Professor Berger states, the framers did not have it in mind at the time or that they knew they had a segregated school system, is irrelevant.

Senator SPECTER. Well, Judge Kennedy——

Judge KENNEDY. So with that preface, we then come to the next part of your question: Can the court ever decide a case contrary to intent? I just wanted to make it clear that I somewhat disagree with the thesis that you interjected at the outset because I think *Brown* v. *Board of Education* was right when it was decided, and I think it would have been right if it had been decided 80 years before. I think *Plessy* v. *Ferguson* was wrong on the day it was decided.

Senator SPECTER. Judge Kennedy, I quite agree with you that *Plessy* was wrong and *Brown* was right, and I am very pleased to hear you say that people can rise above their own injustices, and that a society can rise above its own inequities. Those are very sound principles, and I am pleased to hear you say that.

But I do not square the statement you made at the Judicial Conference, referring to framers' intent, with the statement you just made, "What the framers actually thought was irrelevant." You have made a statement about ratifiers, legislators, and I agree that when you have a constitutional amendment, you have the framers who adopt it in Congress and then you have ratification by the state legislatures. But if you take a look at the states which ratified the 14th amendment, you will find that they were the States where the factual situations outlined by Professor Berger were in existence.

I do not quote Professor Berger for any philosophical approach or any theory or any conclusion. I quote Raoul Berger for the factual basis. And I could quote many other sources. He just has it neatly pigeonholed in terms of putting in one place the fact that segregation, segregated schools were a fact of life—in the District of Columbia, in Southern States, in Northern States. Segregation was a fact in the Senate chamber. The principal sponsor of the 14th amendment said it was not intended to have integrated schools, that segregation was the order of the day. And in the statement you made at the Judicial Conference, you talk about framers; you do not talk about ratifiers. "There must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers."

So I do not quite understand your statement today, "What the framers thought was irrelevant." Could you expand upon that a bit?

Judge KENNEDY. Well, number one, I not only should expand on it, I should probably correct it. It is highly relevant what the framers thought. But the general inquiry, the principal inquiry, should be on the official purpose, the official intent as disclosed by the amendment. In looking at legislative history to determine the meaning of Congress, we sometimes find statements made on the floor of the Senate or the floor of the House that seem almost at variance with the purpose of the legislation when viewed overall as an institutional matter. I am applying that same rule here.

With reference to framers, I and many others use "framers" in a rather loose sense. I think obviously we want to know what Madison and Hamilton thought, and the other draftsmen of the Constitution. But theirs is not the entire body of contemporary opinion and contemporary expression that we look to.

In my view, for instance, the abolitionist writings are critical to an understanding of the 14th amendment. It was in response to their concerns that that amendment was enacted.

Senator SPECTER. Well, Judge Kennedy, when you say that the principal inquiry should be directed to the official purpose, who is going to determine the official purpose? In the case of *Brown* v. *Board* in 1954, the Supreme Court of the United States declared that as a matter of basic justice and equal protection of the law, as

we understood that concept, it was patently unfair to have black children go to segregated schools.

Judge KENNEDY. Yes.

Senator SPECTER. But if you contrast that with what the intent was of the framers, ratifiers of the 14th amendment, the cold facts are that their intent was very different.

That leads me to a conclusion that the real judicial philosophy comes through when you say that people can rise above their own injustices, rise above their inequities, but really look to an intent of justice and an official meaning of equal protection as it is viewed in 1954, as opposed to the way it is viewed in 1868, when the 14th amendment is ratified; and there are segregated schools and a segregated Senate gallery. And the operative intent of the Congressman who passed the amendment and the legislators who ratified it were to be satisfied and really expect segregation.

Judge KENNEDY. Well, I am not saying that the official purpose, the announced intention, the fundamental theory of the amendment as adopted will in all cases be the sole determinant. But I think I am indicating that it has far more force and far more validity and far more breadth than simply what someone thought they were doing at the time. I just do not think that the 14th amendment was designed to freeze into society all of the inequities that then existed. I simply cannot believe it.

Senator SPECTER. Well, I agree with that. But to come to that conclusion, you have to disregard what is a pretty obvious inference of intent of the framers or ratifiers because they lived in a segregated society.

Judge KENNEDY. That is true, and I think maybe many Senators felt at the time they passed the Civil Rights Act of 1964 that they lived in a society that did not comply in all respects with what the statute required them to do. They were willing to make a statement that society should be changed. The Constitution is the preeminent example of our people making such a statement.

Senator SPECTER. But the legislature's role is clearly established under our principles of government. The contest comes up as to whether the court has any business handing down a decision like *Brown* v. *Board* if the court is supposed to look only to framers' intent. And I think the court did have business doing that. But if you contrast that with the Civil Rights Act of 1964, everyone would say, well, that is up to the Congress; that is up to the elected officials; contrasted with the judges who have life tenure who should not make political decisions. And if you have a shifting meaning of equal protection—and I think you do, and I think that is the realism—then it seems to me that that is realistically an abandonment of a rigid nexus to the intent of the framers and ratifiers in 1868.

Judge KENNEDY. Well, I do not want to put us in a deeper trench, because I think there is an element of agreement between us. But I must insist that the intention of the 14th amendment is much more broad than you seem to state in the predicate for all of your questions.

Senator SPECTER. Well, where do you find the intention in the Equal Protection Clause of the 14th amendment more broadly stated than the fact of segregation, which was, in practice, obviously in the minds of the framers and ratifiers?

Judge KENNEDY. It was very clear to me that the purpose of the 14th amendment was to effect racial equality in public facilities in this country.

Senator SPECTER. But what did that mean?

Judge KENNEDY. It was very clear from the abolitionist writings; it was very clear from some of the statements on the floor; and it is abundantly clear from the text of the language, which admits of no exception, in my view. I think the framers were willing to be bound by the consequences of their words. And their words are sweeping, and their words are very important and they have great power.

Senator SPECTER. Are you saying that there is something in the legislative history of the Equal Protection Clause of the 14th amendment which specifies that schools should be desegregated?

Judge KENNEDY. No. Those who addressed the amendment specified their purpose in much broader, much more general terms. I think that they were willing to be bound by the consequences of what they did and the consequences of what they wrote. And I think *Plessy* v. *Ferguson* was wrong the day it was decided on that basis.

Senator SPECTER. Well, I agree with you about that, and I agree with you about *Brown* v. *Board* being correctly decided. But I do not——

Judge KENNEDY. But that cannot be because society changed between 1878 and 1896.

Senator SPECTER. Well, I was not around in 1896 when *Plessy* was decided, and neither were you. So our perspectives are very different. But the perspectives of the framers, I think, were clearly established by the facts of life.

I do not see how you can take a broad principle and say that there was framers' intent or ratifiers' intent to have equal protection, which is specified in desegregation, when the schools were all segregated and the Senate gallery was segregated and the principal sponsor, Congressman Wilson, said it was not their intent to have desegregated schools.

It seems to me that the conclusion is conclusive that it is just Judge Kennedy and Arlen Specter viewing it in a different era with different eyes, and the inequities appear differently. As you say, people can rise above their own injustices and above their inequities. And it is a different interpretation, and it does not really turn on what the framers necessarily had in mind.

Judge KENNEDY. Well, I agreed with you until your last statement, because I think what the framers had in mind was to rise above their own injustices. It would serve no purpose to have a Constitution which simply enacted the status quo.

Senator SPECTER. Well, let me move on to another category, the——

Judge KENNEDY. And, incidentally, we should note for the record that Mr. Justice Harlan was there in 1896, and he dissented in *Plessy*. *Plessy* was not a unanimous decision. The first Mr. Justice Harlan.

Senator SPECTER. Well, he was correct, but it was a decisive minority view, unfortunately. Only one out of nine saw it, contrasted with *Brown* v. *Board* where all nine saw it. In our society, it is hard to understand how anybody ever saw it differently or why it

took the political branches—the Congress or the executive branch—so long to catch up. That is the point you make in your speech, pointing to the courts and not to the political branches.

That underscores what I consider to be a very basic point that at times, notwithstanding the valid principle of judicial restraint, and notwithstanding the fact that it is up to the Congress and the political branches to establish public policy, public policy of change, that the inequities can be so blatant that the court must step in, as it did in *Brown* v. *Board*, and say that equal protection simply mandates desegregation, which is, of course, what happened.

Judge KENNEDY. Well, you know, it sometimes takes humans generations to become aware of the moral consequences, or the immoral consequences, of their own conduct. That does not mean that moral principles have not remained the same.

Senator SPECTER. Well, I believe that these are very important considerations on judicial philosophy, Judge Kennedy, because judges everywhere are applying them—not only in the Supreme Court, but in courts of appeals and in District courts and in State courts. And people are listening to what Judge Kennedy has to say about these subjects, perhaps even to what some of the Senators have to say about the subjects.

There is a real battle on interpretivism and legal realism, and to look for some conclusive nexus between framers' intent and the decision in a specific case is very, very difficult, and in my own view in *Brown* was impossible. But we have explored it at some length. I would like to move on, if I may now——

Judge KENNEDY. Certainly, Senator.

Senator SPECTER [continuing]. To the subject of neutral principles. Here, again, we are on a subject which has been very extensively applied. And judges are always looking to neutral principles, and the hard thing is to make a decision about what a neutral principle is.

You say, or said, in a speech to the Sacramento chapter of the Rotary Club just a few months ago, October 15th of this year, that "Closely related to the inquiry over the legitimacy of constitutional interpretation is the dangers that courts might be thought of as exercising policy review and not applying neutral judicial principles." And you pick up on that same theme in your response to the Judiciary Committee's questionnaire, when you say that "Judges must strive to discover and define neutral juridical categories."

In a speech you gave to the Stanford law faculty on May 17, 1984, you refer to Dean Ely, and you say, "He might make the argument that we prove his point that interpretivism is more hollow than real, because obviously the framers could not and did not foresee a sprawling administrative state."

And my question to you, Judge Kennedy, is: Considering, as you have said in this speech, that there are some circumstances which the framers could not have contemplated, obviously—such as the sprawling administrative state—just how far can you go on the principle of interpretivism as a fixed and resolute ideology for application by the courts?

Judge KENNEDY. All right. You are talking about quite a few things here.

Let me say at the outset that it is somewhat difficult for me to offer myself as someone with a complete cosmology of the Constitution. I do not have an over-arching theory, a unitary theory of interpretation. I am searching, as I think many judges are, for the correct balance in constitutional interpretation. So many of the things we are discussing here are, for me, in the nature of exploration and not the enunciation of some fixed or immutable ideas.

Once again, we must be very careful to note that when we speak of intent we speak on many different levels. The fact that the framers never thought of an ICC is not entirely relevant. The question is whether or not an administrative agency can and does fit within the principles that the framers announced for separation of powers.

Now, the position of administrative agencies in a system in which the Constitution mandates the separation of powers—legislative, executive, and judicial—has not been clearly established in the case law. Much work needs to be done there. It seems to me that the Government of the United States could have hardly survived without those agencies, and that may itself be a strong argument for the fact that they are legitimate, given what the framers promulgated. But that whole area of the law, as Professor Bator, I think, has described it, is a very unruly one. And I think, the courts have not really come to grips with how to explain the position of an administrative agency, that is, whether or not it is an appropriate exercise of article I power.

Did I answer the question?

Senator SPECTER. Yes, I think you did early on. I am pleased to hear you say that you have no cosmology of constitutional theory, no over-arching principles, and I think that is a very important basic concept. When you take up the ideologies of original intent or you take up the ideologies of interpretivism and neutral principles, there is a tendency, as I see it, for the Supreme Court, for the federal courts or any courts to become musclebound and unduly restrictive.

There are many cases that we could take up. I wanted to discuss with you at some length *Baker* v. *Carr*, where you have noted in your own writings that there is no established philosophy. And you characterized *Baker* v. *Carr*, one-man, one-vote, as the wroughting of a revolution. In some of our hearings, we have become entangled in very rigid ideological philosophies of the court. And I repeat, I am pleased to hear you say that you are looking for a balance as opposed to immutable philosophies, to give you the answer in every case, even though you may not be able to find original intent or even though you may not be able to find a neutral principle of interpretivism.

I have got about 4 minutes left, Judge Kennedy, or 3. The time really flies.

I want to come to a central issue about the administration of justice and due injustice, and I intend to return to this in another round. I have made reference in my opening to a very provocative comment, very interesting comment, very constructive comment which you made in your speech to the Canadian Institute in 1986 where you say, "A helpful distinction is whether we are talking about essential rights in a just system or essential rights in our

constitutional system. Let me propose that the two are not coextensive."

Now yesterday, when Chairman Biden was asking you questions, you adopted the principles of the second Justice Harlan, and if I had time I would go through Cardozo and *Palco* and fundamental values and Frankfurter. We may have time later to come to that. But when we talk about doing justice and we talk about people rising above their own inequities and above their own injustice, why should it not be that the essential rights in our constitutional system should not be coextensive with the essential rights in a just system? Or stated differently, should not essential constitutional rights be implemented to see to it that essential rights in a just system are recognized, that the two are coextensive?

Judge KENNEDY. Well, I think the American people would be very surprised if a judge announced that the Constitution enabled a judge to issue any decree necessary to achieve a just society. The Constitution simply is not written that way. And I think it is an exercise in fair disclosure to the American people, and to the political representatives of the Government, to make it very clear that the duty to provide a just society is not one that can be undertaken solely by the judiciary.

I indicated yesterday there is no truly just or truly effective constitutional system in the very broad sense of that term—constitutional with a small "c"—if there is hunger, if there are inadequate educational opportunities, if there is poor housing. It is not clear to me that the Constitution addresses those matters.

Senator SPECTER. My time is up. I will return later. Thank you very much, Judge Kennedy.

Thank you, Mr. Chairman. Thank you, Senator Metzenbaum.

The CHAIRMAN. Now, we will turn to Senator Metzenbaum.

Senator METZENBAUM. Judge Kennedy, in the *Aranda* v. *Van Sickle* case, you joined a decision which held that the constitutional voting rights of Mexican-Americans were not violated by the election system of the city of San Fernando, California. That was a case where Mexican-Americans claimed that they had been denied their voting rights by the city, and that they had been denied equal access to the political process.

Some Hispanic groups, it is only fair to say, find that decision very troubling. They say that you ignored a lot of evidence which showed that the political process was not equally open to participation by Mexican-Americans, and that Mexican-Americans had less opportunities than other residents to participate in the political process and elect legislators of their choice.

For example, the evidence showed that up until 1972, two-thirds of the polling places had been located in the homes of whites, and "that the private homes which were used were invariably not Spanish-surnamed households, and they were not located in an area of the city where Mexican-Americans lived."

In your opinion, you said, "There is no substantial evidence in the record indicating that location of polling places has made it systematically more difficult for the Mexican-Americans to vote, causing Mexican-Americans who otherwise would have voted to forego voting."

I guess in this connection I might quote a Supreme Court Justice, when referring to obscenity, who said, "I know it when I see it." And I sort of feel the same thing about this kind of situation. Is it not sort of common sense, or does it not sort of speak for itself, that when you locate polling places in white homes and in a Mexican-American area that you are going to bring about the results—I think the results were that only 28 percent of the Mexican-Americans were voting, although they made up about 48 percent of the population.

I just was wondering how you came to the conclusion you did in that case.

Judge KENNEDY. Well, I am pleased to talk with you about that case, Senator. I found it a very troubling case and still do.

You began by saying that in that case I found that the constitutional rights of the Hispanic community to vote were not violated.

Senator METZENBAUM. Would you mind pulling the mike a little bit around? Thank you.

Judge KENNEDY. You began by saying that in that case I found the constitutional right to vote of Hispanics in the community were not violated. That was precisely what I was concerned about. It was precisely what I did not find. It is precisely why I wrote a separate opinion.

In this case, the plaintiffs, who were residents of the city of San Fernando in Southern California, brought a challenge to the at-large system of voting, and they asked for the remedy of a federal court decree to require district voting—the purpose being so that Hispanics could have representation in the city government. Although I forget the facts of the case, I will assume that there were neighborhoods which were largely Hispanic. I think that is probably implicit in the facts of the case. So they would have achieved that had that remedy been granted.

The lower court found the evidence insufficient to state a cause of action and granted summary judgment. My two colleagues on the court agreed. I felt that there was something wrong in that case. So I undertook to write a separate opinion to express my concerns.

I went through the evidence and brought out the fact that voting booths were located in non-Hispanic neighborhoods, that there had been no representation on city commissions and boards, et cetera. I indicated that these facts might very well support an action for relief in the federal courts.

In that case, however—and you are never sure why lawyers and litigants frame the cases the way they do—the insistence by the plaintiffs was that they wanted only the one remedy of a district election scheme rather than an at-large election scheme. That is the only remedy they sought.

This is one of the most powerful, one of the most sweeping, one of the most far-reaching kinds of remedies that the federal court can impose on a local system. And in our view, or in my view as expressed in the concurrence, that remedy far exceeded the specific wrongs that had been alleged. I concluded that the remedy sought did not match the violation established. But I made it very clear—and that was the point of my opinion in what I still consider trou-

bling and a very close case—I had a serious concern that individual rights violations had been established in the record.

What was the outcome of that case, whether a subsequent suit was brought based on my concurring opinion, I do not know. My concurring opinion is a textbook for an amended complaint, or a textbook for a new action. I tried to indicate my concerns and my sensitivities in that case rather than simply joining in the majority opinion, which I thought did not adequately address some very real violations.

Senator METZENBAUM. Did you make it clear, in your opinion, that if the remedy sought had been a different one, that based upon the same facts, and I think the facts also were that all of the election process was in English and it made it that much more difficult for people to vote, but had the remedy sought been a different one, that you very well might have arrived at a different conclusion?

Or is that your comment here today?

Judge KENNEDY. Well, I thought that that was implicit if not explicit in my opinion. I was writing a concurring opinion. I did not have the second vote, so I could not order—I could not frame the judgment in the case.

Senator METZENBAUM. Just on this point, why did you not let it go to the jury? You affirmed a summary judgment.

Judge KENNEDY. Or to the finder of fact.

Senator METZENBAUM. Or to the finder of fact. Since you were troubled by it, and there were the egregious circumstances of polling booths being in white homes, that decision is made by the local ordinance, by the local election officials, if you were troubled by it, why not then let it go to the next stage and let a finding of fact be permitted?

Judge KENNEDY. Well, remember, number one, I just don't have the judgment. But so far as my own separate concurring opinion, why didn't I recommend that, I guess would be your question.

Senator METZENBAUM. Yes. And you might at the same time answer this: why could you not have indicated in your decision what the proper remedy should be? Even though the plaintiffs sought a certain kind of remedy, couldn't you have come to the conclusion in your opinion that another kind of remedy was appropriate? Perhaps the court is not required to deny all relief merely because the petitioner comes in asking for one kind of remedy. Shouldn't the court be able to come up with another remedy in this case?

Judge KENNEDY. That is a fair question, and I am not sure I have an adequate answer in my own memory—now.

As I recall the case, we explored the case with counsel extensively at oral argument. And counsel said, "This is a case in which all we are seeking is an abolition of at-large elections. That is all this case is about." And that was my concern.

Why clients and attorneys present cases in this way is beyond me. It was very clear to me, based on my understanding of the record, that any Hispanic resident could bring an action to change the places of the polling booths and to rectify the other injustices that were there in the system.

Now, under the—well, I'm not an expert in the amendments to the Voting Rights Act of 1980, I haven't had cases on those. At this time, we were operating under the assumption that the remedy had to fit the wrong, and that was the argument that I had with the attorneys in the case.

But I wanted to make it very clear in the concurring opinion that I was concerned with the treatment that the court was giving to these litigants, and I wanted to put on the record that I thought there was some evidence of discrimination.

And I guess, Senator Kennedy, the answer to your question of why didn't it go to the finder of fact, is because the attorneys insisted that this was all the suit was about, at-large versus district elections.

I just did not see that as a plausible remedy, as a permissible remedy, given the violations they had established.

Senator METZENBAUM. I don't think we need to debate it further. But suffice it to say, if I were a Mexican-American, I think there would be a keen sense of disappointment that you did not take that extra step so that the summary judgment would not have precluded a different kind of remedy.

And as you have already said, maybe you could have or should have indicated something to that effect.

Judge KENNEDY. Well, it brings up the troubling point that I have not resolved, Senator: To what extent can courts try lawsuits for the litigants. In this case, as I recall, these were extremely experienced, capable attorneys.

Senator METZENBAUM. Judge, I want to make a distinction on that point.

Judge KENNEDY. And for me to say, well, now, you have done this the wrong way, you go back, when they insisted they did not want to do that, it seems to me is perhaps overstepping.

Senator METZENBAUM. You are saying that the court cannot try the case for the litigants' attorney.

But I do not think it was a matter of trying the case in a different manner. I think it was a matter of providing a different solution, a different conclusion, than the summary judgment.

The evidentiary material was already in the record. It was sufficient. There were Mexican-Americans, 48 percent; 28 percent only voting. Voting booths were in the white homes. All of the election process was in English.

So the facts were there. And so I do not think it is a matter of saying that the court had to tell the lawyers how to try the case differently. I think what you're really saying is whether the court should come up with a different kind of result or different kind of remedy than that which is being sought by the litigants.

Judge KENNEDY. Well, but it is not clear to me that the court should, if the litigants insist that this is all they are asking for.

Senator METZENBAUM. Well, I understand your point.

Judge KENNEDY. And the whole point of the decision was that I did not want Hispanics to think that I did not think there were some serious problems down there in San Fernando.

Senator METZENBAUM. Let me go on to another issue.

Let us look at your 1985 opinion in *AFSCME* v. *State of Washington* where you reversed a lower court finding that the State had

violated the civil rights law by paying women substantially less than men for comparable work.

Until the early 1970s, the State of Washington ran segregated male-only and female-only help wanted ads. In 1974, following a comprehensive job pay study, the State concluded that women overall were paid about 20 percent less than men in jobs of comparable value, and in certain jobs, were paid as much as 135 percent less.

These differences were not related to education or skills. They were related only to sex. After the State study, then Governor, now Senator, Evans, conceded there was an inequity, and said the State had an obligation to remove it.

Despite its knowledge of the inequity, the State did not correct it. The district court held that the State's knowing, quote, "deliberate perpetuation," end of quote, of a discriminatory pay system, combined with the State's admission of the discrimination, and its past segregated job ads, supported a finding of unlawful discrimination under title VII of the civil rights law.

Now, in reaching that conclusion, the court was guided by the Supreme Court's 1981 *Gunther* decision, which said that Congress wanted title VII's prohibition of discriminatory job practices to be, quote, "broadly inclusive, to strike at the entire spectrum of disparate treatment of men and women resulting from their sex stereotypes," end of quote.

The district court's findings obviously raise very serious questions as to the state's discriminatory practices toward women.

I have difficult in understanding your complete rejection of the court's conclusion on these facts. And I wonder if you would care to address yourself to it because it is a decision that frankly has many in this country very worried.

Judge KENNEDY. I would be glad to address it, Senator.

We must at the outset distinguish between equal pay and comparable pay. The Congress of the United States has a statute which says that women and men in the same positions are to be given the same pay.

That is not what this case was about. That law is clear; that policy is clear; that obligation is clear; and the courts enforce that.

That is not what this case was. What this case was about was a theory that women should be paid the same as men for different jobs.

The theory of the case was that the State of Washington was under an obligation to adopt this differential pay scale or a compensatory pay scale, because it had notice of the fact that there were pay disparities based on long classifications and stereotypes of women in particular jobs.

I understand that. You do not have to be married to a school teacher for very long to figure out that the reasons educators are not paid enough in this country is because for hundreds of years the education system has been borne on the backs of women.

They have borne the brunt of it. And I think you can make a pretty clear inference that the reason for those low pay scales is because women have dominated that profession. I think that is very unfortunate.

On the other hand, it is something of a leap to say that every school district in the country is in violation of title VII because it does not adopt a system whereby you find comparable worth and lower the salaries of drivers of equipment which, say, are male dominated jobs—let's assume they are—and raise the salaries of women.

That may be a commendable result but, number one, we did not see in title VII that Congress had mandated that result, or in the Equal Pay Act. We looked very carefully at the legislative history.

Second, we did not see, in the evidence presented to us, that the State of Washington had intentionally discriminated by continuing to use the market system in effect.

The State of Washington was subject to a judgment for $800 million, which I take it is a large amount of money, perhaps even in Washington, DC, on the theory that their failing to depart from the market system and from market forces was an actionable violation.

Now, the Governor recognized—I forget if it was the Governor or the legislature or both—that in their view, the State as an affirmative matter should undertake this correction.

We did not think, however, that there was a shred of evidence to show that the State had deliberately maintained that pay scale difference in order to discriminate against women.

It is true that the State had in the past advertised for some job categories as male only. And the State had corrected that.

Once again, I guess we are talking about the difference between the wrong and the remedy.

Senator METZENBAUM. I am not sure we are in this case, because the Supreme Court in the *Gunther* case laid down the rule that title VII's ban on discriminatory job practices should be liberally interpreted and strictly enforced.

Now, what concerns me is whether you applied title VII too narrowly. You seem to hold that to prove discriminatory treatment, it would be necessary to show that the employer harbored a—this is your word—"discriminatory animus," end of quote, or a discriminatory motive.

But the district court had already found that the State of Washington knew for several years that it was perpetuating a discriminatory pay system.

Didn't you go too far in immunizing an employer from title VII liability? Should not an employer who has knowingly and deliberately perpetuated a discriminatory wage system be legally liable for engaging in unlawful employment discrimination?

Judge KENNEDY. We held not. We held that under that formula—it appeared to me, it appears to me, that under that formula, every employer in the United States is charged with an intentional discrimination because it follows the market system even though it did not create that market system.

Senator METZENBAUM. But it seems to me the case is very similar to *Gunther*. *Gunther* went beyond equal pay for equal work. *Gunther* said that a case could be brought where the court was not required to make subjective assessments of job worth.

The State did its own study in this case, and therefore there was no requirement in the *AFSCME* case that the court make a subject judgment.

There was the finding by the State. The State had done the work. The facts were there. *Gunther* had recognized that it appeared to be enough. The appellate court, with you writing the opinion, reversed that and undermined the rights of the women established in the *Gunther* case.

And frankly, it is a kind of a case that causes great concern, and my guess is, we will hear some testimony, some witnesses, on the subject. Women are saying they are concerned about whether you went too far to reverse the lower court in this case, and went beyond the requirements of the Supreme Court as enunciated in *Gunther*.

Judge KENNEDY. I am absolutely committed to enforcing congressional policy to eliminate barriers that discriminate against women, particularly in employment or in the market place or in any other area where it is presented to me.

We do not have a free society when those barriers exist. We do not have a free society if women cannot command pay that is calculated without reference to the fact that they are of a particular sex.

But it is simply not clear to me at all that the State of Washington, because it undertakes a survey and discovers what is intuitive for many people, that some job classifications are dominated by women and that they are paid less, can be held to be a violator for not correcting that.

I think the State should be commended for undertaking the study. If the holding were that any employer who undertakes a study of comparable worth is liable for failing to correct the inequity—I simply don't think that the Congress has let the courts go that far.

If the Congress wants to enact that, I will enforce it. If the Congress has not enacted it, I cannot as a judge invent it.

Senator METZENBAUM. But the lower court found the law and the evidence adequate. *Gunther* seemed to say that much evidence was sufficient.

And what is of concern to this Senator, as well as to many women, is that you then saw fit to reverse.

But let us not belabor that point.

Judge KENNEDY. Well, it is an important case, Senator, and I do not mind talking about it. A couple of final points. First, my understanding is that every other court in the country that has looked at the issue has reached the same result. Second, we indicated that in a case where you can establish that the wage scales were set because women were dominant in the pay group, there could be an actionable violation, of course.

We made that very clear. We did not find it on this evidence.

Senator HATCH. Howard, would you yield to me for a comment on my time? It will take less than a minute.

Senator METZENBAUM. If the Chair permits it.

The CHAIRMAN. If there is no objection from anyone else.

Senator HATCH. I just want to point out that in the *Gunther* case the court specifically noted that it was not deciding the case on the basis of comparable worth. It was simply ruling on a discriminatory method of evaluation.

In this case, you didn't have the same set of circumstance. And one last thing, this was a three judge decision, right?

Judge KENNEDY. Yes.

Senator HATCH. How was it decided?

Judge KENNEDY. It was unanimous.

Senator HATCH. Okay. That is all.

Senator METZENBAUM. And you wrote the opinion?

Judge KENNEDY. Yes, sir.

Senator METZENBAUM. And I am not going to get into a debate with my colleague on it, because I want to go further.

I want to ask you about a labor law case called *Kaiser Engineers.* As you know, that case involved the question whether employees who petition their Congresspersons on a matter of public policy that affects their job security are engaging in protected activity under the National Labor Relations Act.

The ninth circuit held that it was unlawful to discharge employees who wrote to their Congressman regarding a proposed change in immigration policy that they felt threatened their jobs.

You wrote a dissent from the ninth circuit majority opinion. Two years later, the Supreme Court in the *Estek* case squarely rejected your position.

Justice Powell, writing for seven members of the court, concluded that employees are protected when they seek to improve terms or conditions of employment through channels outside the immediate employer-employee relationship.

The court specifically mentioned appeals to legislators, and cited the *Kaiser* majority decision with approval.

In light of the Supreme Court's decision in *Estek,* have you reevaluated your position? And do you feel that perhaps the conclusion you reached in the *Kaiser* was wrong?

Judge KENNEDY. I am fully satisfied with the decision of the Supreme Court. I should note that in *Kaiser* the implication of the employees was that the employer was supporting their policy position. And the employer's decision to discharge was based on a theory that the engineers had misrepresented the employer's position.

But as for the rule that the Supreme Court has announced, I have absolutely no trouble with. And I think it is a good rule.

Senator METZENBAUM. I must tell you, Judge, that I am troubled by the pattern of your opinions in the area of labor law.

In addition to the *Estek* case, there are two instances in which the Supreme Court granted review of ninth circuit decisions involving labor law questions.

In both cases, you wrote, or joined the opinion. In both decisions involving labor law questions.

In both cases, you argued for a restrictive interpretation of employee or union bargaining rights.

In both cases, the court rejected your position by a vote of 9 to 0.

I refer here to the 1982 case called *Woelke* v. *Romero,* and the 1986 case called *Financial Institution Employees of America.*

But the Supreme Court cases really only tell part of the story. In your 12 years on the bench, you have participated in more than 50 decisions reviewing orders issued by the NLRB.

It is my understanding that although you have voted to reverse board rulings against the employer approximately a third of the time, you have never voted to overrule the NLRB when it has ruled in favor of the employer.

It seems to me that your judicial writings reflect a disturbing lack of concern for the bargaining rights of employees. I hope that I am wrong.

Can you suggest some other interpretation of this record? Or can you tell us where or when in your opinions or other writings you have evidenced a commitment to employee rights in the collective bargaining context?

Judge KENNEDY. It is very clear to me that the unions of this country are entitled to full and generous enforcement of the national labor relations laws that protect their activities.

The box score here I am not quite familiar with. It is a fundamental matter of national policy that workers are protected in their right to organize, and in their right to collective bargaining.

And in my view, I have fully and faithfully interpreted the law in that regard. I have great admiration for working people. I worked through all kinds of jobs when I was working my way through school.

Since I was 14 or 15 years old I had jobs with manual laborers. I learned that they had a great deal of wisdom and a great deal of compassion, and that their rights should be protected by bargaining agents.

Senator METZENBAUM. Just in conclusion, I do not think the question really is, are some of your decisions right or wrong, but I think the issue is whether your consistent support for the employer position on important, unresolved matters of statutory interpretation is indicative of a predisposition in the area of labor law.

I do not know. If you are confirmed maybe my questions today will cause you to reflect a bit on this very issue.

Thank you, Judge.

Judge KENNEDY. Thank you.

The CHAIRMAN. As preordered, we will now go to the Senator from Vermont, and then the Senator from New Hampshire.

Senator LEAHY. Thank you, Mr. Chairman. Judge Kennedy, welcome back.

Judge KENNEDY. Thank you, sir.

Senator LEAHY. To you and your family. I always like to get a chance to get my family to sit still this long to listen to me, and I say that only semi-facetiously, because they have had to sit through and listen to too many speeches during campaigns and everything, and do it dutifully.

But I think this is such an extraordinary circumstance, as it should be in your life, that I hope it has been something of interest to your family. Certainly we have never seen anybody sit here more attentively than they have.

Judge KENNEDY. Thank you very much, sir.

Senator LEAHY. Judge, I mentioned to you when we met privately that I was impressed with your comments at the White House in which you said that not only did you look forward with eagerness to these hearings, but, and I am paraphrasing now, that they very definitely were not only an integral part of our constitutional

makeup, but a very important one, and one that should be done thoroughly and completely.

Do you still feel that way, I hope?

Judge KENNEDY. Certainly, Senator, I do.

Senator LEAHY. I want to ask you questions in three different areas, primarily. One is in the privacy area; one is in the criminal law area—I spent about a third of my adult life as a prosecutor, so I have an interest there, and you have written a number of cases there; and then lastly in the first amendment area

Normally, in these things, I take first amendment first, but a number of your comments to me privately, a number of decisions you have made in the past, give me a lot more comfort in those areas than a number of other nominees have.

To begin in the area of privacy, I wonder if I might just follow up on a couple of questions. Senator Biden asked you a number of questions in this area yesterday. In response to one, you said that you think, "most Americans, most lawyers, most judges, believe that liberty includes protection of a value we call privacy."

You did not state your own view at that point. But slightly later you said that you had no fixed view on the right of privacy. Senator DeConcini followed up on that. And in response to a question from him, you said that you had no doubt about the existence of a right to privacy, although you prefer to think of it as a value of privacy.

Is this a semantic difference? Or is there a difference between right and value? And if there is a difference, what is your view?

Judge KENNEDY. I pointed out at one time in yesterday's hearings that I am not sure whether it is a semantic quibble or not. I think that the concept of liberty in the due process clause is quite expansive, quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional heritage. It seems to me that sometimes by using some word that is not in the Constitution, we almost create more uncertainties than we solve. It is very clear that privacy is a most helpful noun, in that it seems to sum up rather quickly values that we hold very deeply.

Senator LEAHY. But you understand——

The CHAIRMAN. Will the Senator yield on that point?

Senator LEAHY. Certainly.

The CHAIRMAN. And this may save some time, because I had a whole round of questions on this.

Let me put it to you very bluntly. Do you think *Griswold* was reasoned properly?

Judge KENNEDY. I really think I would like to draw the line and not talk about the *Griswold* case so far as its reasoning or its result.

I would say that if you were going to propose a statute or a hypothetical that infringed upon the core values of privacy that the Constitution protects, you would be hard put to find a stronger case than *Griswold*.

The CHAIRMAN. That doesn't answer the question. Is there a marital right to privacy protected by the Constitution?

Judge KENNEDY. Yes—pardon, is there a——

The CHAIRMAN. Marital right to privacy.

Judge KENNEDY. Marital right to privacy; that is what I thought you said. Yes, sir.

The CHAIRMAN. Thank you.

Senator LEAHY. Well, if I might follow on that, have you had any cases so far when you have been in the Court of Appeals where you have had to follow the *Griswold* case?

Judge KENNEDY. The *Beller* v. *Middendorf* case was one where we examined it and discussed it extensively. The case we discussed yesterday.

And I'm tempted to say that is the only one.

Senator LEAHY. But in that, what reference did you make to *Griswold*?

Judge KENNEDY. We tried, I tried, in the *Beller* case, to understand what the Supreme Court's doctrine was in the area of substantive due process protection, and came to the conclusion, as stated in the opinion, that the Supreme Court has recognized that there is a substantive component to the due process clause.

I was willing to assume that for the purposes of that opinion. I think that is right. I think there is a substantive component to the due process clause.

Senator LEAHY. And that is your view today?

Judge KENNEDY. Yes.

Senator LEAHY. When you first——

Judge KENNEDY. And I think the value of privacy is a very important part of that substantive component.

Senator LEAHY. The reason we spend so much time on this is that it is probably the area where we hear as much controversy and as much debate in the country about Supreme Court decisions as any single issue. Certainly I do in my own State, and I am sure others do. It is a matter that newspaper debates will go on, editorial debates will go on.

And in a court that often seems tightly divided, everybody is going to be looking at you. None of us are asking you to prejudge cases. But I think also, though, if we are going to respond to our own responsibility to the Senate, we have to have a fairly clear view of what your views are before we vote to confirm you.

I should also just add—something that obviously goes without saying—we expect you to speak honestly and truthfully to your views, and nobody doubts but that you will. Some commentators and some Senators seem to make the mistake of thinking that a view expressed by a nominee here at these confirmation hearings must, by its expression, become engraved in stone, and that a nominee can never change that view. You do not have that view, do you?

Judge KENNEDY. Well, I would be very careful about saying that a judge should make representations to the committee that he immediately renounces when he goes on the court.

Senator LEAHY. That is not my point, Judge Kennedy. What I am saying is that I would assume that your own views on issues have evolved over the years.

Judge KENNEDY. Yes.

Senator LEAHY. What I am suggesting is that even as to views expressed here, should you go on the Supreme Court, there is noth-

ing to stop an evolution of your views in either direction, or in any direction?

Judge KENNEDY. I think you would expect that evolution to take place. And with reference to the right of privacy, we are very much in a stage of evolution and debate.

I think that the public and the legislature have every right to contribute to that debate. The Constitution is made for that kind of debate.

The Constitution is not weak because we do not know the answer to a difficult problem. It is strong because we can find that answer.

Now it takes time to find it, and the judicial method is slow.

Senator LEAHY. It is also an evolutionary method, is it not?

Judge KENNEDY. It is the gradual process of inclusion and exclusion, as Mr. Justice Cardozo called it. And it may well be that we are still in a very rudimentary state of the law so far as the right of privacy is concerned.

If you had a nominee 20 years ago for the Supreme Court of the United States, and you asked him or her what does the first amendment law say with reference to a State suit based on defamation against a newspaper, not the most gifted prophet could have predicted the course and the shape and the content of the law today.

And we may well be there with reference to some of these other issues that we are discussing.

Senator LEAHY. I would hope that all Members of the Senate will listen to that answer. I think that the fallacy that has come up, in some of the debate on Supreme Court nominees—one that has probably been heard across the political spectrum—is that we can somehow take a snapshot during these hearings that will determine for all time how Judge Anthony Kennedy or Judge Anybody is going to then vote on the Supreme Court on every issue. And that just cannot be done, and in fact, should not be done. That is not the purpose of these hearings.

You said back in June of 1975, at the time you were sworn in to the Court of Appeals, that you were not yet committed in this debate on the reach of the federal Constitution. I think what we would like to explore, though, is what has happened in that 12 years. You have written in numerous cases, participated in hundreds of cases. And so you have been part of that constitutional debate, and your thinking has evolved. And let me just go into a couple of areas of that.

In the Stanford University speech that everybody has talked about here, you said that it is important to distinguish between essential rights in a just system, and essential rights in our own constitutional system. And as I understand your speech, the rights in the first category—rights that some may consider essential to a just system but not essential rights in our own constitutional system—are not enforceable by our courts. Is that correct?

Judge KENNEDY. That is correct. I was quite willing to posit that the framers did not give courts authority to create a just society.

Senator LEAHY. Now those rights that are essential to a just system are those things like providing adequate housing, nutrition, education, those kind of rights?

Judge KENNEDY. Yes, sir.

Senator LEAHY. And that requires affirmative government action?

Judge KENNEDY. Mostly affirmative government action, although the Supreme Court in a case, *Plyler* v. *Doe*, held that the State of Texas could not altogether deprive illegal aliens of education.

Senator LEAHY. So there are essentials?

Judge KENNEDY. So even here there is an area for the courts to participate in.

Senator LEAHY. So there are some essential rights in our own constitutional system, to use your words, that are not explicitly spelled out in the Constitution, but are enforceable by our federal courts?

Judge KENNEDY. The equal protection jurisprudence makes that rather clear.

Senator LEAHY. Now, earlier this year in the Ninth Circuit Judicial Conference speech, you said that each branch of government—and I assume you include the courts in that—is bound by an unwritten constitution that consists of our ethical culture, our shared beliefs, our common vision.

Are there rights included in this unwritten constitution?

Judge KENNEDY. Well, I would think so, yes.

Senator LEAHY. Such as?

Judge KENNEDY. My point about the unwritten constitution, I suppose, has been to try to explain how that term was used by early political philosophers.

Plato, Aristotle, Hobbes, all talked about the constitution. And what they meant was, the whole fabric of a society.

As you know, there are something like 160 written constitutions in the world today. Very few of them work like ours does. And yet their terms in some cases are just as eloquent, and perhaps even more eloquent.

Their terms are somewhat more far-reaching in the grant of the positive entitlements that we have talked about, the right to adequate housing, food, shelter.

But they do not work. The reason ours works is because the American people do have a shared vision. And I think important in that shared vision is the idea that each man and woman has the freedom and the capacity to develop to his or her own potential.

That is somewhat different than the Constitution states it, but I think all Americans believe that. And I think that has a strong and a very significant pull on the legislature and on the courts.

Senator LEAHY. At the same time, an unwritten constitution—you say that it instructs government to exercise restraints. What does the court do when another branch of government ignores that counsel and takes some unrestrained action? Say the action of another branch does not violate a specific constitutional prohibition, can the courts strike that down because it violates this unwritten constitution that restrains all branches?

Judge KENNEDY. No. But, again, this is the consensus that our society has that makes it work. One of the great landmark——

Senator LEAHY. How do you square them if you have got these essential rights out there one way—that is, at the same time you have got the essential rights pushing here, but you have some unrestrained action pushing there. Do they square?

Judge KENNEDY. Well, I hope they square.

Senator LEAHY. Can the courts make them square?

Judge KENNEDY. Absent an abiding respect by the people for the judgments of the court, the judgments of the court will not work. And the Constitution does not work if any one branch of the Government insists on the exercise of its powers to the extreme.

One of the great landmarks in constitutional history was when President Truman complied within the hour with the Supreme Court's order to turn back the steel mills. President Nixon did the same thing with the tapes. That is what makes the Constitution work.

The Constitution fails when a governor stands in front of the courthouse with troops to prevent the integration of the schools subject to a Supreme Court order. The Constitution does not work very well when that happens.

Senator LEAHY. Let me just go back a bit, if I might, Judge. In a democracy, any branch of our Government exists only if there is respect for that branch, only if it can be heeded. If we did not respect the constitutional mandate for a President to leave office at the end of his term and the new President to come in, where would we be?

Judge KENNEDY. Yes.

Senator LEAHY. I think it is a very powerful statement to the rest of the world when we see a President who may have been defeated in an election riding with the incoming President up for the oath of office. It is a very powerful statement if we have a President die in office and another President comes in immediately with total continuity.

But I think you were suggesting more of what happens with the courts. In the last generation, have we pushed that parameter where faith or confidence or respect for the courts may have been damaged?

Judge KENNEDY. I do not think so. I think courts have the obligation always to remind themselves of their own fallibility in this regard. They have the obligation to announce their judgments in neutral, logical, accepted terms that are consistent with the judicial method. And the courts have, of course, the obligation to respect the legislative branch.

Your example of the President leaving office is probably a better example than any one that I have thought of on this mystic idea of this unwritten constitution. I think it is an important example; it is a good one.

Senator LEAHY. But we have courts stepping into areas of great controversy. Without going into specific cases, we do it in areas of busing, of abortion, of civil rights, voting rights. Some of these things are very explosive, and we have had instances where Federal troops have had to be brought out, Federal marshals, local police, State police, to enforce the ruling of a court. But yet if the court is right, you are not suggesting that they should then refrain from issuing that kind of a ruling, even if it may well require strong and controversial executive action to carry out the ruling?

Judge KENNEDY. No. The courts, except in perhaps rare instances, have never shrunk from their duty to interpret the Constitution and they never should. But as you indicate, one of the really

great ironies of our system is that a branch of the Government that is not supposed to be political in nature has historically resolved disputes of great political consequences. One of the great issues for the first 30 years in this country was whether or not Congress had the right to establish a national bank. And the Supreme Court stepped right into the middle of that—and fairly early in the controversy—and it has not been successful in extricating itself since.

But the point is that a court must recognize that its function is not a political function; it is a judicial one. We manipulate different symbols. We apply different standards.

Senator LEAHY. Judge, let me ask you about another right that was not mentioned in your Stanford speech—the right of the press and the public to attend criminal trials. In the case of *Richmond Newspapers* v. *Virginia*, the Supreme Court recognized this right, though the court acknowledged that "The Constitution nowhere spells out a guarantee for the right of the public to attend trials".

You have had occasion to enforce what apparently is an unenumerated right to attend trials. I believe that in one of the DeLorean trials, you did. Do you think the Supreme Court made a right or wrong turn when it recognized the right of public access in the first place, in the *Richmond Newspapers* decision?

Judge KENNEDY. Well, rather than comment specifically on the opinion, I would say that right of access generally is an important part of the first amendment and is properly enforced by the courts.

Should I wait?

Senator LEAHY. No. Just a bomb going off. Senator Heflin does sort of a bomb alert, but we never clear the room for little things like that.

Judge KENNEDY. In the *DeLorean* case, incidentally, the question was whether or not newspapers could inspect sentencing documents.

Senator LEAHY. You say that from the first amendment, but that is an expansive reading of the first amendment, is it not?

Judge KENNEDY. I am not so sure that it is that expansive.

Senator LEAHY. You would not consider that expansive? You would not consider it an expansive reading of the first amendment, the right of the public to be——

Judge KENNEDY. That the press is allowed to be at trial?

Senator LEAHY. Press to be at a trial.

Judge KENNEDY. Well, I think perhaps we could characterize it as an expansive reading.

Senator LEAHY. But a justifiable one? I am not trying to put words in your mouth. I am really not trying to put words in your mouth.

Judge KENNEDY. I think a very powerful case can be made for the legitimacy of that decision.

Senator LEAHY. Thank you.

What about the right to teach a foreign language to one's children? In the Stanford speech, you point out that such a right might be found from an expansive reading of the first amendment. The Supreme Court did not find the right there but recognized the right anyway in the case of *Meyer* v. *Nebraska*.

Judge KENNEDY. Yes. *Meyer* v. *Nebraska* has a whole catalogue of rights that the Supreme Court thought were fundamental, some of them quite expansive—the right to pursue happiness. The first amendment, it seems to me, has tremendous substantive force and can easily justify the result in *Meyer* and *Pierce*.

Senator LEAHY. But that was not what the Supreme Court found.

Judge KENNEDY. No. The Supreme Court at that time, I think, was essentially unaware of the expansive nature of its first amendment decisions. Those cases were 1916. Well, the laws were passed in 1916, and then it took a few more years to get up to the court.

Senator LEAHY. But were they wrong in their decision? I mean, did they have the right result, the wrong reasoning?

Judge KENNEDY. Well, my point was that the statements in the opinion, the broad statements of the opinion, I was not sure could support a whole body of jurisprudence.

Senator LEAHY. Well, that whole list of rights: should they recognize and enforce each of the rights they listed out in *Meyer*?

Judge KENNEDY. Did they——

Senator LEAHY. No. Should they recognize and enforce each of the rights in *Meyer*? You have got the right to marry, to establish a home, bring up children, worship.

Judge KENNEDY. Again, I think that most Americans think that they have those rights, and I hope that they do. Whether or not they are fully enforceable by the courts in those specific terms is a matter that remains open.

Senator LEAHY. So are those rights—you find a right of privacy—but as to the rights in *Meyer*, I did not quite follow your last answer. That threw me a bit. Would you repeat that, please?

Judge KENNEDY. Well, it is not clear to me that each and every one of the rights set forth in *Meyer* can sustain a complaint for relief in a federal court. I would be very puzzled if I received a complaint that alleged that the plaintiff was denied his right to happiness.

Senator LEAHY. Well, in fact, that is sort of like what you said in the Stanford speech. Let me just take one quote out of there. You say, "It seems intuitive to say that our people accept the views set forth in *Meyer*, but that alone is not a conclusive reason for saying the court may hold that each and every right they have mentioned is a substantive, judicially enforceable right under the Constitution".

What do you look for beyond just the feeling that our people accept these rights to make them such fundamental rights that they are judicially enforceable?

Judge KENNEDY. Well, there is a whole list of things, and one problem with the list is that it may not sound exhaustive enough. But, essentially, we look to the concepts of individuality and liberty and dignity that those who drafted the Constitution understood. We see what the hurt and the injury is to the particular claimant who is asserting the right. We see whether or not the right has been accepted as part of the rights of a free people in the historical interpretation of our own Constitution and the intentions of the framers.

Those are the kinds of things you look at, but it is hardly an exhaustive list. You, of course, must balance that against the rights asserted by the State, of which there are many.

Senator LEAHY. What if some of those rights that you see felt by our people, strongly felt, conflict with your own personal views? What then?

Judge KENNEDY. I think that the judge, in assessing what the society expects of the law, must give that great weight rather than his or her own personal views.

Senator LEAHY. Where do you look, what do you look to to find out, you know, what these rights are—and I realize we are talking in a very gray area. Probably to some who might be listening this may seem like an academic discussion that is wonderful for a classroom. And somebody suggested yesterday your students will be watching to see how you answer this. I have to think that these are the same kinds of questions that have gone through judges' minds to a greater or lesser degree when we have made some of the major moves in our Constitution—some of the cases we now refer to as milestones and others would refer to as abrupt and unforgivable changes, depending upon which side you are on.

But what do you look to when you try to determine what those rights are that are so solid in our people, those senses of right? How do you find them?

Judge KENNEDY. Well, I wish I could give a good, clear answer to the question. I think in that same speech I said in frustration, "Come out, come out, wherever you are", looking for the sources and the definitions of unenumerated rights.

You look in large part to the history of our own law. This is what stare decisis is all about. You look to see how the great Justices that have sat on the Court for years have understood and interpreted the Constitution, and from that you get a sense of what the Constitution really means.

An English representative in the House of Commons once said that "History is Philosophy teaching by example"; and I think that the law can be described the same way.

Senator LEAHY. Judge, you are 51 years old. If you are confirmed, you are going to serve on the Supreme Court well into the next century. Anybody just looking back at the history of the Supreme Court in the last 20, 25 years knows that it has had to go—it has been faced with very difficult questions—and it has had to move the Constitution forward—or backward, depending, again, how people look at it—but certainly move it, change it from what people thought of as being a settled Constitution at that time. And you have to know that you are going to be faced with that same position, once, twice, maybe many times if you are on the Supreme Court. Does that cause you any apprehension, or do you look forward to that? Have you thought about that?

Judge KENNEDY. It causes me some apprehension, some awe. No jurist, no lawyer, no nominee could aspire to be on the Court that was occupied by Holmes and Brandeis and Cardozo and the two Harlans and Black, not to mention the great Marshall, without some of those feelings.

On the other hand, the very fact that those judges were there and that they wrote what they did gives the Constitution and the

judicial system great strength and great power. It enables the judge to continue to explore for the meaning of the Constitution. That is what I wish to do.

If you had a visitor coming to this country, and he asked: What is it that makes America unique? What is the gift that we have for civilization? What is it that America has done for history? I think most people would say America is committed to the Constitution and to the rule of law. And I have that same commitment.

Senator LEAHY. Thank you, Judge.

Thank you, Mr. Chairman. I would ask unanimous consent that written questions from Senator Simon be submitted on his behalf.

The CHAIRMAN. Without objection.

[Senator Simon's questions appear on p. 739.]

The CHAIRMAN. Senator Humphrey, who has waited patiently. The Senator from New Hampshire.

Senator HUMPHREY. Good morning, Judge Kennedy. I have been patiently waiting, anxiously waiting. I so much enjoy these hearings. This is really what I had in mind when I offered myself as a candidate for the U.S. Senate, this sort of thing. This is what I envisioned, not the passing out of money to the gimme groups, which is our daily fare around here.

These are very interesting hearings. I have found them fascinating. Frankly, I would not mind if we had another three or four after your confirmation, may I say. I would not mind if we had another three or four in the next year. I find these to be so fascinating. That might have a good effect on the court, may I say. I happen to believe that it would.

Fascinating though they are, the hearings do become a little oppressive at times, so I want to begin with a joke which comes at the expense of lawyers. If you have heard this, pretend you have not.

A woman called a law firm and asked for Mr. Smith, who was—I guess it was a man. I beg your pardon. A man called a law firm and asked for one of the senior partners whose name was Mr. Smith. The receptionist said, "Oh, I am very sorry. I guess you have not heard the news. Mr. Smith passed away three months ago."

And the caller said, "I want to talk with Mr. Smith." The receptionist said, "You do not understand. He is dead. He is deceased."

And the caller said, "I want to talk with Mr. Smith." "Sir, he is dead. Don't you understand?"

And the caller said, "Yes, I understand, but I cannot hear it often enough." [Laughter.]

Well, while it is true that we make jokes about lawyers, certainly the profession of the law is very important, and the role of the Supreme Court, the Judiciary, particularly the Supreme Court, is critically important. The Supreme Court is the Super Bowl of the law profession, and you are auditioning, in a way, for a place on the team.

The CHAIRMAN. We will have order in the room. Thank you. I know the joke was funny but * * * [Laughter.]

Senator HUMPHREY. Now, to get down to serious matters, you write your own speeches; is that correct?

Judge KENNEDY. Yes, Senator; for better or worse.

Senator HUMPHREY. Well, they are very good. The ones I have read are very, very good. Inasmuch as you write them yourself, that gives us some insight into your thinking. I find your logic to be very clear.

The Stanford speech is one that has been examined a number of times. That is an important speech. It is a very good speech, would you not say so?

Judge KENNEDY. I enjoyed it. I want to make clear that I never speak from notes.

Senator HUMPHREY. Yes.

Judge KENNEDY. I gave the Senate what notes I had. I think that speech came out about that way.

Senator HUMPHREY. Yes.

Judge KENNEDY. One of the dangers is you sometimes forget the principal part of the speech until after you have given it.

Senator HUMPHREY. Well, we all understand that. I think it is a very good speech. I want to examine a few parts of that and then parts of some other speeches, if I have time.

Let me quote from your Stanford speech.

"One can assume that any certain or fundamental rights should exist in any just society. It does not follow that each of those essential rights is one that we, as judges, can enforce under the written Constitution."

"The due process clause is not a guarantee of every right that should inhere in an ideal system."

Is that a correct quote?

Judge KENNEDY. That is a correct quote, and I think it is a correct concept.

Senator HUMPHREY. You have not changed your mind since 1986?

Judge KENNEDY. No, sir.

Senator HUMPHREY. "The due process clause is not a guarantee of every right that should inhere in an ideal system." So it is not a blank check?

Judge KENNEDY. Certainly not.

Senator HUMPHREY. How about the ninth amendment?

Judge KENNEDY. Well, as I indicated yesterday, the meaning of the ninth amendment, and even its purpose, is shrouded in doubt, and the Court has not, in my view, found it necessary to refer to that amendment in order to stake out the protections for liberty and for human rights that it has done so far in its history.

Senator HUMPHREY. Never used the ninth amendment to ground an opinion——

Judge KENNEDY. Yes. There may be some quarrel with that statement because of an isolated reference by Mr. Justice Douglas in the *Griswold* case, and by the concurring opinion of Mr. Justice Goldberg in the same case.

Senator HUMPHREY. Well, if judges—in your opinion—if judges cannot enforce each of the essential rights which should exist in a just society, what should the Court do to move us toward a more ideal system when the political branches fail to act?

Judge KENNEDY. I suppose the Court can cry in protest if it sees an injustice in a particular case. The law is an ethical profession, and the law is designed to seek justice.

And if courts see an injustice being done, I think the oath of our profession requires us to bring that to the attention of the Congress. On the other hand, judges who are appointed for life cannot use the judiciary as a platform for their own particular views. So there is a duality there.

Senator HUMPHREY. What do you mean by "judges bringing that to the attention of the Congress"?

Judge KENNEDY. Well, from time to time, in our opinions we tell the Congress, please look at this statute and see the way we are enforcing it. Do you really want us to do this? I think that is quite a legitimate function of the Court.

I have said that in some of the RICO cases. Some of my other colleagues have, too. It is just not at all clear to us that the way we are enforcing RICO is what Congress really had in mind, but we are following where the words lead us.

Senator HUMPHREY. I want to go back to the ninth amendment.

Yesterday, you said it seems to me the Court is treating it as something of a reserve clause to be held in the event that the phrase liberty, and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision.

You say, it seems to me the Court is treating, has been treating it as a reserve clause.

Is that your view, that it ought to be treated as a reserve clause, to be held in the event that the spacious phrases are inadequate to the matter at hand?

Judge KENNEDY. My characterization was what I thought the philosophy of the Court was to date, and I think it is important that the Court not confront such an ultimate and difficult issue unless it has to.

A case grounded solely on the ninth amendment requires the judge to search in the very deep recesses of the law, where I am not sure there are any answers.

Senator HUMPHREY. Well, if I have time, I want to come back to the ninth amendment and discuss the historical context, the intent of the authors and the framers, which seems to have been ignored in some of the discourse in this hearing so far.

May I ask the Chairman his intent with regard to a second round.

The CHAIRMAN. We will stay as long as the Senators have questions.

Senator HUMPHREY. Good. Quoting again from your Stanford speech, Judge, you said: "The unrestrained exercise of judicial authority ought to be recognized for what it is—the raw exercise of political power."

"If in fact that is the basis of our decisions, then there is no principled justification for our insulation from the political process."

Why did you feel constrained to raise the subject of unrestrained exercise of judicial authority in that speech?

Judge KENNEDY. I think there is a concern in society that the courts sometimes reach results simply because the courts think in their own view that those results are right, and I think it is extremely important for judges to remember that they are not political officers in black robes.

On the other hand, I think it is also important for the public to know the limitations of our own powers. Perhaps the public is, from time to time, disappointed with the cases that we write.

Perhaps the public thinks that we should reach out to rectify an injustice, to amend a complaint, to change a lawyer's theory of the case, and the constraints of the judicial process simply do not always allow that.

Senator HUMPHREY. You speak of the public concern, but your audience was judges. It was not a public speech, was it? Was it judges, or lawyers?

Judge KENNEDY. These were judges from Canada who have a new constitution.

Senator HUMPHREY. Yes.

Judge KENNEDY. They had been under a parliamentary system where the legislative authority is supreme, as have the English judges for many, many years, and they were curious to know what the extent of their authority was.

And I think it fair to say most of them were looking forward to exercising it, and therefore, I was sounding a note of caution.

Senator HUMPHREY. Well, you say the public is concerned that judges have sometimes overreached. Is Anthony Kennedy concerned that judges have sometimes overreached?

Judge KENNEDY. I think it is always a legitimate concern, and that we must remind ourselves, constantly, of the limitations on our authority.

Senator HUMPHREY. But I mean the question in more than the abstract sense. Is it your view that at times in our history, the Supreme Court has overreached, has exercised, rawly exercised political power?

Judge KENNEDY. There are a few cases where it is very safe to say that they did, the *Dred Scott* case being the paradigmatic example of judicial excess.

Senator HUMPHREY. So it is more than an abstract matter. How about in modern times? Is it your view? This is a modern speech, a contemporary speech. You felt constrained to make a rather strong statement about abuse of the judicial prerogatives.

I have got to think that it is almost a cri de coeur. Is it?

Judge KENNEDY. I did not really have a list of cases in mind. I had more in mind an approach, an attitude that I sometimes see reflected on the bench.

Senator HUMPHREY. An approach and an attitude?

Judge KENNEDY. That I sometimes see reflected on the bench in my own court.

Senator HUMPHREY. So irrespective of ultimate decisions, you are concerned at least about an approach and an attitude in certain instances, in contemporary times?

Judge KENNEDY. Yes, and this can affect the decisional course of the court.

The CHAIRMAN. If I understand the answer to the question the Senator asked, is that there are no specific cases which you had in mind when you referred to the unrestricted exercise——

Judge KENNEDY. That is correct. None come immediately to mind. But that concern always underlies the examination by a

judge of his own writings, or her own writings, and of the writings of their colleagues.

It is something you must constantly be aware of as you are trying to evaluate the pulls and tugs, and the impulses and the constraints that come to bear on the decisional process.

Senator HUMPHREY. This approach and attitude which caused you to make the statement cautioning against unrestrained exercise of judicial authority, as raw exercise of political power—this concern about the approach and the attitude that you have seen in contemporary times, in some cases—is that something that bothers you, professionally?

Judge KENNEDY. Well, I do not think the judiciary of the United States, as a whole, has departed from its mandate or its authority, but I simply think it is a concern that must always remain in the open, so that judges are aware of the limitations on their authority.

Senator HUMPHREY. Moving from general concerns over your views on judicial restraint to the privacy issue, in your Stanford speech you noted that *Bowers* v. *Hardwick* upheld the Georgia law which proscribes sodomy, yet you noted the decision did not overrule *Griswold*, the case which announced the right of privacy.

And then you asked, "Are the decisions then in conflict over the substantive content of the privacy right?"

My first question is, when you speak of decisions, are you speaking of *Bowers* vis-a-vis *Griswold*, or are you speaking of *Bowers* vis-a-vis *Dudgeon*, which the Court, in your opinion——

Judge KENNEDY. Yes. There is a case called *Dudgeon*, decided by the European Court of Human Rights, under the Convention of Human Rights, and it reached a result that was absolutely contrary to *Bowers* v. *Hardwick*, and as I indicated in the speech, the Supreme Court had enough to wrestle with with its own precedents without trying to incorporate the European court. But I thought that it was an interesting exercise to compare the European court case with the *Bowers* case.

Senator HUMPHREY. I am still not perfectly clear——

Judge KENNEDY. And the answer is the comparison was between the *Dudgeon* case and the *Bowers* case.

Senator HUMPHREY. Well nonetheless, do you see any conflict between *Bowers* and *Griswold*?

Judge KENNEDY. Well, the methodology of the cases, it seems to me, are not easy to square, although that is nothing to be particularly upset about. The law accommodates a certain amount of contradiction and duality while it is in a state of growth. Absent a perfect society, justice and symmetry are not synonymous.

Senator HUMPHREY. You say there should be a certain amount of—how did you phrase it a moment ago?—a certain amount of ambiguity?

Judge KENNEDY. I think I said duality and tension. I do not know.

Senator HUMPHREY. Well, that seems to contradict what you said yesterday, when you said that judges are not to make laws, they are to enforce the laws. This is particularly true with reference to the Constitution. That judges must be bound by some neutral, definable, measurable standard in their interpretation of the Constitution.

Are you not contradicting yourself?

Judge KENNEDY. Well, between the idea and the reality falls the shadow. We attempt, of course, to have symmetry. We attempt, of course, to have cases that are all on fours with each other.

To the extent they are not, that indicates that the court has further work to do.

Senator HUMPHREY. I think in the meantime, it strikes me that in the meantime, while the Court is doing its further work, some citizens are suffering injustices.

I suppose we cannot hope for perfection in the courts, but I would certainly hope for objectivity, to the greatest possible extent.

Judge KENNEDY. I would agree with that, Senator. I think that is perhaps the correct resolution—objectivity.

Senator HUMPHREY. The problem with judges is that they are human beings, and that is why the theory does not quite work out.

Judge KENNEDY. Madison said if men were angels we would not need a Constitution.

Senator HUMPHREY. Well, I want to discuss your *Beller* opinion, not that I want to take up the subject of homosexuality, or discuss the merits, or the demerits, or the immorality of homosexuality, but I want to discuss your *Beller* opinion because there is certain language in there that worries this Senator.

You said that, quote: "We recognize, as we must, that there is substantial academic comment which argues that the choice to engage in homosexual activity is a personal decision that is entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual's right to privacy."

Why did you feel in writing that, that you must recognize substantial academic comment? My goodness, you can find academic comment to justify almost anything. There is just as much, and far more weighty opinion in centuries of law, and thought, and writing, which you did not bother to mention in your opinion.

Judge KENNEDY. Well, I had read extensively in preparing for this opinion, in order to understand the right approach, and I usually think it is fair to the parties to set forth the things that I have read.

This was the first case involving a challenge to the discharge of homosexuals from the military, and I spent a great deal of time on it, and I thought it important for the reader, and for the litigants to know that I had considered their point of view.

Senator HUMPHREY. Do you find something commanding about academic opinion versus societal mores, when they differ?

Judge KENNEDY. Well, it is interesting that the legal profession is the only profession that is intimidated by its initiates. We have law review articles written by students who are not even lawyers and they get paid a great deal of attention, I guess that is one thing that keeps the law vigorous and vital.

But I am not overly persuaded by academic comment. I frankly do not have time to read very much of it.

Senator HUMPHREY. You referred, likewise, in your Stanford speech to the responsibility of the political branches, quote, "to determine the attributes of a just society." How much weight, as a judge, or as a Justice, will you give to the political—the responsibil-

ity, indeed, the prerogatives of the political branches to determine the attributes of a just society?

Judge KENNEDY. I think it is the prerogative and the responsibility of the political branch to take the leadership there. As I have indicated yesterday, I think the political branch has the obligation to assess each of its actions under the standard of constitutionality, and I think when the Court confronts an act by a legislature, it must know, it must recognize that the legislators understood the Constitution, that they acted deliberately with reference to it, and the legislature is entitled to a high degree of deference.

This is not just the political system at work. It is the constitutional system at work.

Senator HUMPHREY. Let us turn to criminal law. In your speech to the Sixth South Pacific Judicial Conference this year, you said, "Equally disturbing is that Goetz"—referring to the case in New York of the subway shooting—"Equally disturbing is that Goetz emerged from the subway incident as a hero in the eyes of a large portion of the citizenry: the victim who finally fought back. If the rule of law means that citizens must forego private violence in return for the State's promise of protection, then the public acclaim with which Goetz's actions were received in some quarters indicates that the present criminal justice system breeds disrespect for the rule of law."

If that is so, must the judiciary share in the responsibility for a criminal system which breeds disrespect for the rule of law?

Judge KENNEDY. Absolutely. The judiciary system is responsible for the immediate supervision and the immediate implementation of the criminal system. The judiciary has itself made many of the rules that are binding upon the police, and it is the obligation of the judiciary to constantly reassess those rules as to their efficacy and as to their reasonableness.

In this connection, we were talking about violent crime. We were talking about victims who feel helpless in the wake of crime, and courts must be very, very conscious of their front-line position here.

Senator HUMPHREY. Well, did you mean to say in your speech to the conference that the present criminal justice system breeds disrespect for the rule of law? Is that what you were saying?

Judge KENNEDY. I think that it can in some quarters. Everybody can point the finger to each other, but I think the courts bear a large responsibility. I know in some States, some States represented by the members of this committee, there simply are not enough funds for courts, for law enforcement officials, for correctional facilities. And it is a tremendous problem.

What we do is take care of society's failures. We have very little to do with preventative measures other than the deterrent value that quick and efficient enforcement of the criminal system brings.

Senator HUMPHREY. The courts must share some responsibility in this present system which breeds, to some extent, disrespect.

Judge KENNEDY. Of course.

Senator HUMPHREY. Including the Supreme Court?

Judge KENNEDY. I would include the Supreme Court, of course.

Senator HUMPHREY. Quoting further from the same speech, "The significant criminal law decisions of the Warren Court focused on the relation of the accused to the State and the police as an instru-

ment of the State. Little or no thought was given to the position of the victims."

Why did you choose to criticize the Warren Court in this?

Judge KENNEDY. Well, it was that court, of course, which implemented the great changes that we have had in the criminal procedure system, changes which are now really a part of that system. I was pointing out the fact that really there has been a lack of awareness by all parts of the Government of the position of the victim.

I had indicated yesterday that victim was a word that I never even heard in law school, and, frankly, I do not think I heard of it until the last 6 or 7 years until the Congress of the United States and commentators brought it to our attention when you passed the Victims Assistance Act.

Senator HUMPHREY. How much time do I have left?

The CHAIRMAN. You have about 2 minutes, but why don't you take more time at this break. We have had you sitting a long time, Judge. What we are going to do is we will break for the luncheon recess when Senator Humphrey finishes, which will end the first round.

But before we leave, I would ask the audience please do not get up. We have a little business to conduct here, so if you are going to leave, leave now and not at the end so we cannot hear what we are about to do. It will take 3 minutes after the Senator from New Hampshire finishes. At that time, we will break. And if you need another 5 minutes or so, you go ahead, Senator.

Senator HUMPHREY. Thank you.

The CHAIRMAN. Is that all right with you, Judge?

Judge KENNEDY. Certainly.

Senator HUMPHREY. I have a speaking engagement off the Hill at 12, so I cannot take too much time. I am sure you will be glad to hear that, Mr. Chairman.

I want to go back to the ninth amendment, Judge Kennedy. If I understood some of the questions correctly, some Senators seem to be trying to get you to say that there are some privacy rights hiding there in the ninth amendment waiting to come out, come out, wherever you are. That seems to me to be a very generous reading of the intent of the authors and ratifiers of the ninth amendment. Wouldn't you agree?

Would you give us your understanding of the historical intent of the ninth amendment?

Judge KENNEDY. Well, as I have indicated, the intent is really much in doubt. My view was that Madison wrote it for two reasons. Well, they are really related. He knew, as did the other framers, that they were engaged on an enterprise where they occupied the stage of world history; not just the stage of legal history, but the stage of world history. These were famous, famous men even by the standards of a day unaccustomed to celebrities. And he was very, very careful to recognize his own fallibilities and his own limitations.

So he first of all wanted to make it clear that the first eight amendments were not an exhaustive catalogue of all human rights. Second, he wanted to make it clear that State ratifying conventions, in drafting their own constitutions, could go much further

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than he did. And the ninth amendment was in that sense a recognition of State sovereignty and a recognition of State independence and a recognition of the role of the States in defining human rights. That is why it is something of an irony to say that the ninth amendment can actually be used by a federal court to tell the State that it cannot do something. But the incorporation doctrine may lead to that conclusion, and that is the tension.

Senator HUMPHREY. May lead to that conclusion.

Judge KENNEDY. May. May lead to that conclusion.

Senator HUMPHREY. Well, let me ask you this, finally. I do hope we will have an opportunity to think about matters further and ask further questions of you. Let me just ask you this, finally, with regard to privacy rights.

What standards are there available to a judge, a Justice in this case, to determine which private consensual activities are protected by the Constitution and which are not?

Judge KENNEDY. There are the whole catalogue of considerations that I have indicated, and any short list or even any attempt at an exhaustive list, I suppose, would take on the attributes of an argument for one side or the other.

A very abbreviated list of the considerations are the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential.

On the other hand, the rights of the State are very strong indeed. There is the deference that the Court owes to the democratic process, the deference that the Court owes to the legislative process, the respect that must be given to the role of the legislature, which itself is an interpreter of the Constitution, and the respect that must be given to the legislature because it knows the values of the people.

Senator HUMPHREY. Those, especially the first category, sound like very subjective judgments.

Judge KENNEDY. The task of the judge is to try to find objective referents for each of those categories.

Senator HUMPHREY. Thank you, Mr. Chairman. Thank you, Judge.

The CHAIRMAN. Thank you.

Let me ask my colleagues who are here, so we can plan the rest of the day and give Judge Kennedy some notion of how long we will be asking him to stick around today. Can my colleagues who are here indicate those who would think they would want a full second round of 30 minutes apiece? Senator Humphrey, Senator Specter, Senator Hatch?

Senator HATCH. I only have a few questions.

The CHAIRMAN. Senator Thurmond, are you going to take 30 more minutes?

Senator THURMOND. No, I will not. I may take 5 minutes.

Senator LEAHY. I might be able to do it in less, but I think there is a good possibility of 30 minutes, Joe.

The CHAIRMAN. All right. I am told that Senator Heflin has a second round and Senator Metzenbaum and Senator Grassley. So

we are up to at least 5 hours if that is the case. I would hope my colleagues might not find it necessary to take the full time.

It would be my intention, Judge, if we can, to have your testimony end today. I know that would disappoint you not to be able to come back tomorrow. But if you will bear with me, with the Chair, we will try, by accommodating 15-minute breaks every couple hours, to finish up today. I would hope we could finish relatively early, but maybe as some of the questions are asked in the second round others will find it unnecessary to pursue, if their line of inquiry is the same, their full 30 minutes.

What I would like to suggest is that, since we kept you so long, we not start another round this morning, and that we recess until, say, a quarter after 1. Well, let us make it 1:30. It will give you an hour and 45 minutes to get some lunch and be back here.

Judge KENNEDY. Thank you, Senator.

The CHAIRMAN. We will start at 1:30 with a second round of questions, and we will see where that takes us.

The hearing is recessed until 1:30.

[Whereupon, at 11:48 a.m., the committee recessed, to reconvene at 1:30 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

Judge, the reason for the absence of my colleagues, both the Democratic and Republican Caucuses are meeting until 2 o'clock, but we will begin.

Judge KENNEDY. All right, Senator.

The CHAIRMAN. In an effort to see if we can finish today.

And I will repeat this when some additional members are here, but although I will not limit anyone on the panel to anything less than 30 minutes, I would like to encourage them to be 20 minutes; and so at 20 minutes I am going to have that little red light go off— go on, I should say, and then we have 10 minutes after. Maybe that might encourage people to move a little bit more. And I will try to do that, and hopefully not even take the full 20 minutes. At the very end I may have a few concluding questions.

Judge, you have, as you discussed with Senator Specter this morning, you have praised dissent in *Plessy* v. *Ferguson*, that infamous separate but equal case that *Brown* overruled, and you praised Harlan's dissent.

As I am sure you are aware, Harlan's dissent in the *Plessy* case has been used by some scholars and officeholders alike to reinforce the notion of a colorblind Constitution; in a way, the idea that has been tremendously powerful in impacting upon one of the elements in the struggle for civil rights in this country, and that is the whole question of affirmative action.

It also is being used by some to argue that Congress lacks the authority to take race into account in any context. The Congress does not have the right to pass any laws even if our action is designed to improve equal opportunity for a group previously discriminated against or to remedy past discrimination.

When you say that Justice Harlan was correct, do you give his opinion that kind of meaning, that it proscribes the Congress from passing any laws to take into account any issue relating to race?

Judge KENNEDY. I recognize the quotation that the Constitution is colorblind. It was, of course, in the context, as you point out, of a case in which affirmative action was not before the Court and has since been used, as an interpretation, to argue against affirmative action. I do not think that that is a necessary interpretation of the opinion.

The CHAIRMAN. Could you tell us whether when you say you agree with Harlan whether it is your interpretation? What do you mean when you say you agree with Harlan's dissent?

Judge KENNEDY. My agreement with Mr. Justice Harlan's dissent is his reasoning as he was applying it to the facts of *Plessy* v. *Ferguson*.

The CHAIRMAN. Can you tell us what your views are on the permissibility of Congress engaging in legislative activity that is characterized as affirmative action?

Judge KENNEDY. The issue has not come before me in a judicial capacity as a circuit judge, and might well as a Supreme Court Justice, so I would not commit myself on the issue.

I will say that my experience in law school taught me the arguments for the practice.

The CHAIRMAN. I beg you pardon?

Judge KENNEDY. My experience in law school taught me the arguments in favor of affirmative action. Whether or not they would prevail in a court of law on a constitutional basis is by no means certain. But, in the law schools, in 1965, one percent of the nation's law school student body was black. After 10 years of effort by the law schools, including the one where I was privileged to teach, to encourage applicants from the black community, that had risen to 8 percent, an 800 percent increase. I know of no professor in legal education that does not think that it is highly important that we have a representative group of black law students in law schools.

It has apparently stayed about that rate, at 8 percent. I will notice in some of my classes there are not as many blacks as the year before, and then I will notice it picks up again. So, it is an area that the law schools, and I am sure other professional schools, are continuing to pay attention to, and I think it is a very important objective on the part of the schools.

I recognize that in the area of State schools there are different kinds of programs that may present constitutional questions that have yet to be resolved fully by the Court. As you know, the Court is still engaged in determining the appropriate rationale and the appropriate explanation for affirmative action under the Constitution.

The CHAIRMAN. I am not sure, quite frankly, how to fairly pursue the issue further with you without getting into areas that you might have to decide on. Your answer indicates a sensitivity to the need to encourage minorities and give them access to all institutions, in this case law, but I am not sure that it sheds much light on whether or not the Congress has the right under the Constitution to pass legislation that in fact requires affirmative action on

the part of various institutions over which it has control or indirect control.

Judge KENNEDY. As you know, the leading case on the subject is *Fullilove* v. *Klutznik*, a Supreme Court case which ratified, validated an affirmative action program for minority hiring for government contracts. That case is quite sweeping in its reasoning and in its rationale. But again, this is an area of the law where there is still much exploration and much explanation to be done on a case-by-case basis. I am not sure if there is any such case on the docket of the Supreme Court this term, but I know there are some cases in the circuits.

The CHAIRMAN. Do you think that voluntary plans by employers, voluntary affirmative action plans are permissible?

Judge KENNEDY. Yes, and incidentally, I said that I have not written in this area. Perhaps that was imprecise. Your question brings to mind one case where we had a unanimous court and I was the author of the opinion. It was called *Bates* v. *The Pacific Maritime Association*, and the question was whether or not a consent decree, which in a sense is voluntary action, was binding on a successor employer.

The previous employer had agreed to the terms and conditions of the consent decree and thereafter sold the enterprise. But the employee pool was the same, the equipment was the same, and we held that the consent decree, which required affirmative action for racial minority hiring, was valid and was binding on the successor. And you might be able to obtain some insight into my approach in this area by looking at that case.

The CHAIRMAN. Let me move to a different area of precedent. I have been fascinated by your responses to my colleagues on the role of history in the evolution of the Constitution and the relationship of the text to the practice and societal values.

And, in your remarks to the ninth circuit, you asked a question of Paul Brest, the dean of Stanford Law School, that I would like to put to you, because it bears upon our discussion here and may also tie this discussion into earlier exchanges you have had with some of my colleagues.

You noted that the Canadian Constitution is only 5 years old, and then you asked Dean Brest, and I think I am quoting, "What do you think would be easier, to be a constitutional judge in Canada or a judge interpreting the Constitution of the United States? Would it be easier to decide a close question when you essentially are a contemporary of those who frame the document or does 200 years of history and experience and teaching give us insight the Canadians don't have?" That is the question.

Judge KENNEDY. Paul Brest is a great constitutional scholar and I wish he had answered the question. He did not.

I thought when I first began teaching constitutional law that John Marshall was in the finest position of all of us to know what the Constitution meant, and in part because of my experience in talking about the Canadian Constitution with the Canadian judges I have changed that view. I think 200 years of history gives us a magnificent perspective on what the framers did intend, on what they did plan, on what they did build, on what they did structure for this country.

Holmes said that "A page of history is worth a volume of logic," and certainly 200 years of history is not irrelevant, so I think we are in a better position. The answer is, I think we are in a much better position.

And the other point is that over time the intentions of the framers are more remote from their particular political concerns and so they have a certain purity and a certain generality now that they did not previously.

The CHAIRMAN. I think I will stop there. I will reserve the balance of my time.

The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Kennedy, I want to commend you for the astute manner in which you have answered the questions during this hearing. You have answered them with credibility and with knowledge. You have shown the great respect you have for the Constitution of the United States, which, in my opinion, is the greatest document that has ever been penned by the mind of man for the governing of a people.

You have shown that you are an independent thinker. In other words, you will draw your own conclusions after you get the facts. And you have shown a knowledge of the construction of the Constitution and the law, which I think is to be admired by all, and that it is your desire to construe it for the best interests of the American people.

On the question of issues, you have impressed me as being open-minded and will give careful consideration. You will follow stare decisis unless there is some overriding reason why you would act differently. For instance, in *Plessy* v. *Ferguson* the Supreme Court reversed itself. There may be instances in the future in which they will reverse themselves, and you would not hesitate to reverse a decision if you felt it was the right thing to do.

You have shown I think that you are not prejudiced and that you will be fair to all. I have been deeply impressed with your testimony. And I am not going to take more time at this point, I think we can all cut these questions short. I think they have had a chance to size you up, and the only conclusion they can reach is you are a good man and ought to be confirmed.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. You don't object to that, do you?

Judge KENNEDY. Not at all. I appreciate the Senator's most gracious remarks.

The CHAIRMAN. The Senator from Ohio.

Senator METZENBAUM. Judge Kennedy, I have some questions in the antitrust area, and I know that is not your special field of expertise, so I am not going to get into what I call the nitty-gritty of some of the Court decisions.

Judge KENNEDY. Well, I know that it is yours, Senator, so I would be pleased to learn.

Senator METZENBAUM. Pardon?

Judge KENNEDY. I know that it is yours, so I would be pleased to learn.

Senator METZENBAUM. Well, I will at least make an overall inquiry.

As you may recall, Judge Bork wrote and testified that manufacturers should be able to fix the resale price of their product even though the Supreme Court has declared such price-fixing per se illegal. Letting manufacturers fix the resale price—and what we are talking about is where the manufacturer tells the retailer that you must sell at a certain price or else you lose the product—would actually drive discounters out of business and consumers would be forced to pay billions of additional dollars.

I am frank to say to you that I consider this a very major issue, because to me the essence and bulwark of this whole system of free enterprise is free competitive forces working and being permitted to work. If manufacturers can say that you can only sell a refrigerator or a stove or a set of dishes, or whatever, at a certain price, I think that is hurtful not alone to the consumer, but also to the nation as a whole. I would sort of like to get your views on the subject as to whether you agree with the current law or with Judge Bork that manufacturers should have the right to fix resale prices?

Judge KENNEDY. At the outset let me tell you, Senator, that I did not hear Judge Bork's testimony on that point and I am simply not familiar with his views. There is a case on the Supreme Court's docket, and I am not sure if it is one that has been argued this term, in which the question of whether or not vertical price restraints, which is the kind of restraint that you have described, are *per se* violative of the antitrust laws. So I should tread very warily about expressing a view on that case.

Senator METZENBAUM. I am not trying to get you into any specific cases. I am more trying to get you into this whole idea of vertical price restraints and the whole question of freedom of the retailer who owns the product to be able to sell at such a price as he or she determines the product should be sold at.

Judge KENNEDY. I understand. I just wanted to tell you why I am going to be very guarded in my answer, because it is such a specific issue that the Supreme Court is now considering.

Generally, I think it is fair to say, and I think that the law should be this, that a *per se* rule is justified if in almost every event it has an anticompetitive effect. Only if a particular trade practice that is challenged is pro-competitive is there a justification for it when there is a restrictive agreement of the kind you describe. I take it that is the starting position for analyzing this kind of problem.

And so the question, I suppose, would be whether or not there can be any demonstration that vertical price restraints are in any respect pro-competitive, and it is not clear to me exactly what showing would be made on that. You can get economists to testify on each side of any issue, as you know.

Senator METZENBAUM. I am not sure how vertical price restraints could ever be shown to be pro-competitive. Almost by definition, the restraint precludes competition.

Judge KENNEDY. That is the question. And, incidentally, by saying that economists testify on either side of the issue, I do not mean necessarily to denigrate them. There is just a great deal of disagreement, and we use experts in lawsuits this way all the time.

Senator METZENBAUM. There is a case called the *State of Arizona* v. *Maricopa County Medical Society*. You concurred in an opinion

that said doctors could fix prices—so long as it was a maximum rather than a minimum price—without automatically violating the antitrust laws.

You rejected the State's argument that the agreement led doctors to charge the maximum, making it legal price-fixing by its very nature. The Supreme Court reversed, holding 4 to 3 that "the anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."

Could you tell us why or how you concluded that maximum price-fixing for the doctors should not be per se illegal, and whether you still feel that same way today despite the Supreme Court's reversal of your opinion in *Maricopa*?

Judge KENNEDY. I thought it was a close case then, and I am quite willing to accept the Supreme Court's decision, although all of us were disappointed that there was not a majority in the Supreme Court—there were only four votes—because the district courts and the circuit courts need guidance and we wanted the Supreme Court to set the rule.

My concern there was that I wanted a record. I wanted the case to go to trial. It simply wasn't clear to me from what I know as a judge, from what I am capable of understanding as a judge, that arrangements for health care services which use a pool of doctors and which allow the patient to choose the particular doctor are in all respects necessarily anti-competitive if they use a price schedule.

Senator METZENBAUM. If they what?

Judge KENNEDY. The issue, as I understood it, as framed by the plaintiffs, who were challenging the scheme, was whether allowing a health plan, where you have a choice of physicians and the physicians have a schedule that they agree upon, is necessarily anti-competitive. I simply saw no body of doctrine or learning or experience in the courts that would justify my coming to the conclusion that in all cases that must be anti-competitive.

The health care field is sufficiently volatile and dynamic, and the cost problems in the health care field are so well understood that I thought that the courts could benefit from a trial where we could have experts testify one way or the other and then evaluate the record. It did not seem to me that the rules for fixing the prices of retail goods necessarily applied to the medical profession, which was attempting to provide this kind of group service.

And the Supreme Court said, in the 4-to-3 opinion, that that was incorrect—that a horizontal price schedule is a horizontal price restraint, and that it is *per se* illegal.

I recognize the utility of *per se* rules. Because if you have a rule of reason trial, which is usually at the other end of the spectrum, it is a global sort of judgment. It is a very expensive suit to try. The plaintiff has to go through an elaborate and costly trial, and, when the trial is over you often do not learn a lot. That is the argument against the rule of reason and the argument for *per se* rules.

My concern was that in the health field—we knew so little about it that we should have a trial on the merits. But the Supreme Court disagreed, and I understand why.

Senator METZENBAUM. While you haven't written a great many antitrust opinions, you appear to have written enough to have a working knowledge of antitrust laws and, undoubtedly, as so far indicated in this last few minutes, some views on it.

I raise the subject not only because it matters a great deal to me, which really is totally unimportant, but because the Supreme Court, as you know, makes a great deal of law in this area. There will be more law made by the Supreme Court with respect to antitrust issues than in almost any other field.

Some have felt free to substitute their own views for those of Congress in applying the antitrust laws. Now, there is no question the antitrust statutes are admittedly general and Congress' intent in enacting them is not all that clear.

Give me your thoughts, if you will, as to what you think Congress had uppermost in its mind when it enacted the Sherman and Clayton Acts, our basic antitrust statutes, and what are your views on the obligations of the Court to ascertain and enforce congressional intent in this area?

Judge KENNEDY. Well, the Sherman Antitrust Acts and the Clayton Acts were passed in an era when corporate acquisitions and mergers were proceeding at a tremendous rate. In the period, I think, from 1900 to 1930, over 7,000 small firms, each with a capital of over $100,000, simply disappeared. The concern was, in the acquisitions and merger field, that the capitalistic system simply could not work if there was not an opportunity for small and medium-sized businesses to invest capital, to have resources and talent in localities throughout the country, and to have some protection against being acquired by competitors and by large conglomerates. This particularly happened in the utility area.

Unfortunately, what happened was that the Supreme Court, in the *E.C. Knight* case, gave a restrictive interpretation under the Commerce Clause to the reach of the Sherman Act, and at the same time they were willing to enforce agreements against price restraints, and the two in combination accelerated this merger pace. And it was only when the Supreme Court changed its rules under the Commerce Clause that antitrust enforcement became a reality in the merger field.

So I think it is necessary to go back to that intent of Congress and to recognize that it is a central part of our national policy to have a capitalistic system which is free, which is open.

So far as the consumer is concerned, the consumer is protected by aggressive price competition, and the antitrust laws make it very clear that price-fixing is improper and illegal. As you know, in some cases violations of the antitrust laws can be criminal, and in those cases I think the criminal law should be vigorously enforced. A price-fixing agreement that is unlawful can cause great damage and great injury, just as much as a bank embezzler can, and I am in favor of strict enforcement of the criminal laws when there is a violation.

Senator METZENBAUM. Some have argued, Judge Kennedy, that mergers are a good thing even if they leave only two or three firms in the market. Would you go that far? And what would be your standards, generally speaking, for judging mergers?

Judge KENNEDY. I am not an economist and I would want to hear the arguments in the particular case before I ventured anything that I think would be of very much substance or help to you, Senator. I would want to look at the facts in the particular case.

Senator METZENBAUM. Well, let me ask you this. Some have argued, and I think it is fair to say that they are conservative antitrust thinkers, that only economic efficiency matters in antitrust analysis; that is, a merger or a monopoly is good if its efficient even if the net result or the bottom line is that it raises prices or hurt the consumer.

Others, and I include myself in this group, believe Congress want our judges to consider other things as well, things like unfair exploitation of consumers, excess concentrations of corporate power, and the effect on small businesspeople.

Where would you come out on this debate—not on any case, but on this whole question of economic efficiency, which is on one side of the issue, versus the questions of unfair exploitation of consumers, excess concentration of corporate power, and negative effects on small business? Where would you want to place yourself in that debate?

Judge KENNEDY. Well, I would not want to do that because I really do not have a fixed position. I think my earlier answer indicates to you that I would be as sensitive to and most interested in those arguments that indicated that economic efficiency was not the sole controlling determinant.

Senator METZENBAUM. So that you, are you saying that those who would maintain that economic efficiency is not the sole determinant would have the burden of proof to convince you that negative consumer impact, or loss of competition, or excess concentration of corporate power, outweigh or negate the efficiencies. Are you saying that the scale starts off being weighted in favor of economic efficiency unless you can prove the contrary? Are you saying that?

Judge KENNEDY. I think that any person who argues for a simple conclusive formula always has the burden of proof to demonstrate to me that it is correct.

Senator METZENBAUM. Well, you could say that factors relating to unfair exploitation of consumers, or excess concentration of corporate power, or effect on small business tie in with previous decisions of the Supreme Court, and that those who claim that economic efficiency is the only thing that matters should have the burden of proof. It is really a question of which comes first, the chicken or the egg. But let us assume that neither comes first, that both are evenly on the scale. And I am saying where does Judge Kennedy come down, without addressing yourself to any particular cases or any particular issues pending before the Court.

I think this is a fundamental concept of antitrust law. I honestly believe that we are entitled to something further on your thinking on the subject than we have so far.

Judge KENNEDY. I just do not want to tell you that there has been a lot of thinking on my part when there has not been, Senator. To the extent that the precedents say that economic efficiency is not the sole determinant—and that is the way I understand most of the precedents in the area—the burden of proof would be on the

person who wishes to change that doctrine and change that approach.

Senator METZENBAUM. I think it is fair to say that this is not a field in which you have been that much involved. I would like to leave you with the concerns of this Senator that the antitrust laws are not liberal laws, they are not conservative laws. They came into being with Republican sponsorship, a Senator from my own State, John Sherman. And that when you have those cases before you I would hope that you would think seriously not just about the impact upon the consumer, not just about the impact upon the businessperson, not just about the impact of those employees who may or may not be forced out of work by reason of corporate mergers, but that you think about the overall impact upon the economic system, the free enterprise system, and recognize that our antitrust laws have served us well over a period of many years in protecting free competition in this country with many of the attendant benefits that have resulted in the system.

Judge KENNEDY. That is an eminently persuasive statement of the antitrust laws, which commends itself to me, Senator.

Senator METZENBAUM. Thank you very much, Judge Kennedy.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Hatch.

Senator HATCH. Thank you, Senator.

Judge, I want to compliment you for the candid way you have answered these questions, and I think you have enlightened us in many ways.

Judge KENNEDY. Thank you, Senator.

Senator HATCH. I just have a few questions I would like to go over with you that I think need to be brought out and may be helpful to everybody concerned, and certainly in this bicentennial time of the Constitution.

I would like to point out there is much value in a unanimous Court. When the Court is unanimous, it tends to put an end to further debate about the merits of any particular decision or issue. Supreme Court historians have recounted how Justice Burger labored diligently to get a unanimous Court in the *U.S.* v. *Nixon* case concerning executive privilege during the Watergate era.

Similarly, historians report that Chief Justice Warren worked prodigiously to get a unanimous decision in *Brown* v. *Board of Education*. You are sworn to uphold the Constitution and we would want you to do nothing else. But there might be times when unanimity on a ruling is more important than your own dissenting view.

Now, how would you weigh the merits of such a case, and what factors would cause you to submerge your own views in deference to the need for a unanimous opinion?

Judge KENNEDY. We have confronted that on our own court, Senator, and it is a difficult problem. But I think, as you have indicated, that it is also a very important one. In some cases on the court in the ninth circuit you can not always tell really how long an author of an opinion has had a case because sometimes when a panel is in disagreement, one of us will say, well, why don't you let me try writing the opinion and I will see if I can solidify our view.

And the two polar tensions here are, on the one hand, the duty of the judge to speak his or her conscience and not to compromise his or her views. Judicial decisions are not a log-rolling or a trading exercise. That is inappropriate. And, on the other hand, there is the institutional need to provide guidance, to provide uniformity, to have a statement of rules that all of the court agrees on. And I think that the Supreme Court functions much better if it has fewer fragmented opinions. Fragmented opinions are terribly difficult for all of us to work with.

I recognize that these are the toughest issues there are, and so views will differ. On the other hand, I think it is the duty of the judge to submerge his or her own ego, to accept the fact that his or her colleagues, too, have much wisdom and have great dedication to the law. Sometimes I have concurred in opinions simply because I did not think the majority had it right, but I can not say that those have added a great deal to the volume of the law. I think there is much in what you suggest, to commend judges to try to concur in other judges' opinions.

Senator HATCH. There is much to that. There is the other side of the coin, too, and, you know, I want to give some thought to that as well. I am speaking about the need to stand courageously alone on matters of principle. *Plessy* v. *Ferguson* was a perfect illustration of that where Justice Harlan, you know, a single Justice, decided that this separate but equal doctrine established by that case was wrong. And, frankly, he issued a remarkable dissent reminding the Nation that the Constitution ought to be "colorblind."

Now, what factors are going to enter into your decision to stand alone as a sole dissenter?

Judge KENNEDY. Holmes and Brandeis were also known for their great dissents. You must stand alone. You may be *vox clamatis in deserto,* a voice crying in the wilderness, even though it is a lonely and difficult position. Judging is a lonely and difficult position. This is a very lonely job, Senator.

The Federal system has its own isolation that it imposes on the judges. Within your own chambers, within your own thought processes, you wrestle to come to the right result. If you think there is a matter of legal principle that has been ignored, if you think there is a matter of principle that affects constitutional rule, if you think there is a principle that affects the judgment in the case, you must state that principle, regardless of how embarrassing or awkward it may be.

Senator HATCH. One final point concerning the changing style of the Supreme Court, more than the substance of its rulings, and that is this. In recent years the Court's opinions have become far more complex. Plurality opinions have multiplied. I think you have noticed it, I have noticed it. Hardly any opinion is issued without an accompanying flurry of concurring and dissenting viewpoints.

On the one hand, as we have discussed, this is an important part of the process because arguments are preserved for the future and develop more deliberately as the legal and political communities respond to an unresolved mosaic of opinions on any particular single issue.

Yet again, when the Court issues an opinion which nods to both sides of an issue, or which includes a five-pronged analysis of com-

plex factors, what the Court has actually done, in my opinion, is abdicate, instead of giving clear guidance as it could do. And by abdicating it thus leaves up to the lower courts to give various kinds of emphasis to various parts of the mosaic which is wrong.

Now what can be done to get shorter, more succinct and clear guidance in some of the Court's opinions?

Judge KENNEDY. Well, I think, Senator, that Justices simply must be conscious of the duties that they have to the public, the duties they have to the lower courts, the duties they have to the bar—to give opinions that are clear, workable, pragmatic, understandable, and well-founded in the Constitution. More than that I cannot say, other than that judges also must be careful about distinguishing between a matter of principle and a matter that really is dear to their own ego.

Senator HATCH. I see you as a person, with your experience both as an eminent lawyer, as a person who has worked as a lobbyist, as a person who might have a great deal of ability on that Court to bring about consensus, and to help bring unanimity in those cases where it should be, and I also see you as a person who is willing to stand up for principle, even if you are the sole dissenter, which is an enviable position as well. So I just wanted to point this out, because a lot of people do not give enough thought to those various aspects of Supreme Court practice.

Judge KENNEDY. I agree that that is a very valuable characteristic in a Justice.

Senator HATCH. Thank you. Let me shift ground just for a minute. I do not want to keep you too long, so I will only take a few more minutes.

But earlier, you were engaged by one of my colleagues in a discussion about original intent. Now because there has been a great deal of concern and confusion about what is meant by original intent, I thought that maybe we could just return for a moment to that particular issue.

In the first place, I prefer the term original meaning to original intent, because original intent sounds like it refers to the subjective intent of the legislators who wrote the Constitution, or its amendments, or in the case of other legislation, the Congress and State legislatures who wrote the legislation or amendments that were passed.

When you use the term "original intent," I presume that you are in reality discussing the objective intent of the framers as expressed in the words of the Constitution.

Would that be a fair characterization?

Judge KENNEDY. Yes, and I am glad that you brought the subject up. I think there is a progression, in at least three stages. There is original intent in the sense of what they actually thought.

Senator HATCH. Right.

Judge KENNEDY. There is original intent in the sense of what they might have thought if they had thought about the problem. I do not think either of those are helpful.

There is the final term of original intent in the sense of what were the legal consequences of their acts, and you call that the original meaning.

Senator HATCH. Right.

Judge KENNEDY. I accept that as a good description. We often say intent because we think of legislative intent, and in this respect, we mean legislative meaning as well.

Your actions have an institutional meaning. One of you may vote for a statute for one reason, and another for another reason, but the courts find an institutional meaning there and give it effect.

Senator HATCH. Well, I appreciate that. Our fundamental law is the text of the Constitution as written, not the subjective intent of individuals long since dead.

Specifically, you were asked if statements by the Members of the 39th Congress acknowledging segregated schools meant that the 14th amendment permitted a separate but equal reading, and I think you were absolutely correct in saying that the text of the 14th amendment outlaws separate but equal, regardless of the statements or subjective intents of some of its authors, and I appreciated that.

In fact this example clarifies my thinking for using the term original meaning instead of original intent. Often, the framers write into the Constitution a rule which they themselves cannot live by. I think the 39th Congress was a perfect illustration of that. They never did completely live up to the aspirations that they included in the Constitution in the 14th amendment, but we should live by the words of the Constitution, not by the subjective intent or the practices of its authors.

In a similar vein, the framers could not anticipate the age of electronics, but they stated in the fourth amendment, that Americans should not be subject to unreasonable searches and seizures.

And so the words and the principles of the fourth amendment govern situations beyond the subjective imaginings of the actual authors back in 1789.

Now do you agree that there are real dangers in relying too heavily on the subjective intent of the framers of legislation, or, in this case, the Constitution?

Judge KENNEDY. Yes. We always have to keep in mind the object for which we are making the inquiry, and the object for which we are making inquiry is to determine the objective, the institutional intent, or the original meaning, as you say, of the document. That is our ultimate objective.

Senator HATCH. Well, we hear criticism sometimes of original intent, or original meaning analysis, and these critics say that intent governs, or, they really ask the question, whose intent is the important intent? In this case, the authors', the ratifiers', the statements made contemporaneously with, the statements that were not fully recorded?

That again, it seems to me, to confuse subjective intent with original meaning. And so I would ask you, in your opinion, whose intent does govern, or whose meaning does govern?

Judge KENNEDY. It is the public acts of the framers—what they said, the legal consequences of what they did, as you point out and suggest by your phrase, not their subjective motivations.

Senator HATCH. That is good. Well, let me just say this: that we could go on and on on this principle, and I think it is a pretty important principle, and one that we really do not discuss enough, and one that I think is very much mixed up.

I think many members of this panel misconstrued Judge Bork's approach towards original intent, as though it was some sort of a Neanderthal approach to just a literal interpretation of the Constitution, when in fact it was far more complex and far more difficult than that.

Let me just say the cases may evolve, circumstances may change, doctrines may change, applications of the Constitution may evolve, but the Constitution itself does not evolve unless the people actually amend it. Do you agree with that?

Judge KENNEDY. Yes.

Senator HATCH. That is all I have, Mr. Chairman. Thank you for the time. Thank you.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

We reviewed, Judge Kennedy, yesterday, some of your decisions on the handicapped, and on fair housing; and we exchanged views about whether the decisions you had made were particularly narrow.

We talked a little bit about the question of sensitivity on cases affecting minorities' rights, women's rights in the clubs issue, where you had been involved and participated in club activities, and then eventually resigned.

I do not want to get back into the facts on those, but I want to get back into related subjects in terms of you, if you are confirmed and because a Supreme Court Justice, whether those, who are either left out, or left behind in the system, can really look to you as a person that is going to be applying equal justice under law.

And there are some concerns that have been expressed through the course of these hearings, and I want to have an opportunity to hear you out further on some of these issues.

I come back to one of the cases that was brought up earlier today, and that is the *Aranda* case.

Judge KENNEDY. Yes, sir.

Senator KENNEDY. We discussed that earlier in the day, and I just want to review, briefly, the evidence in that particular case. You are familiar with it.

—Ten of the fifteen polling places in the city were in the homes of whites living in a predominantly white section of town.

—Although Mexican-Americans constituted 49 percent of the city's population, and 28 percent of the registered voters, only three Hispanics had been elected to the city council in 61 years.

—During a voter-registration drive conducted by the Mexican-American community, the city clerk issued statements alleging irregularities, and the mayor issued a press release charging that unnamed activists were trying to take control of the city government.

—In the preceding election there was evidence of harassment of Mexican-American poll-watchers by the city police.

—And Mexican-Americans were significantly under-represented in the ranks of election inspectors and judges, the membership of city commissions, and the ranks of city employees.

Now, the lower court indicated that they did not find that there was any violation of the law. It was appealed to you. You wrote a separate opinion, and I believe in the exchange earlier today, you had indicated that even if there had been a finding that all of these

facts had been true, that you did not believe that that would justify the kind of relief that was requested by the petitioners, which would have been a change in the whole citywide election process.

Am I correct up to this point?

Judge KENNEDY. I think that is correct. Yes, sir.

Senator KENNEDY. I am not trying to fly-speck you on this, but I want to get to the substance of my concerns.

Judge KENNEDY. I think that is a fair beginning.

Senator KENNEDY. The concern that I would have, and I would think most of those Hispanics would have, is that discrimination today, whether it applies to women or minorities, does not appear on signboards. It is often hidden, and, given, if all of these facts were true, that there had been harassment of the poll workers, that there had been the conscious positioning of those polls in white homes that perhaps did not include Hispanics—given the record—if there had been the harassment of the Mexican-American poll-watchers, why wouldn't you believe that it would have been wise to let the jury, or judge hear out the facts on that, to make a judgment on whether that whole election process and system was sufficiently corrupt and sufficiently discriminatory, so that the kind of relief that the petitioner wanted might be justified?

Judge KENNEDY. In that case, I thought an adequate showing had been made to survive a summary judgment motion. I said that to conclude, "That plaintiff's evidence could not justify striking down the at-large election system, does not, in my view, necessarily mean that the plaintiffs may not be entitled to some relief. For example, plaintiff's statistics regarding placement of polling places in private homes"—this is a very long paragraph.

Senator KENNEDY. Right. The point is, don't you think if you heard, or that a jury heard, the testimony with these kinds of serious allegations about poll-watchers being harassed, and about irregularities by the city clerks, other kinds of these types of activities which obviously, if they are true, and you say even if they are true, might indicate that the whole system, the whole system within that community is sufficiently tainted, that the opportunity for a true election would be virtually impossible? Don't you think if a jury heard and listened to those witnesses that made those allegations, and heard their cross-examinations, given the significance and the importance of discrimination that exists in my own community, in the City of Boston, and in other parts of our country—did you ever think for a moment that we really ought to try to hear that out, or send it back and let a jury or a judge find out how invidious this really is, before we deny, effectively, these petitioners their day in court?

Judge KENNEDY. Yes, it would be a judge in this case, and I thought that the action did justify further pursuit in the courts. I have indicated that I thought that a complaint would lie for these actions.

I did think, Senator, that because of the insistence of the plaintiffs that they wanted only the at-large election remedy, that a judge could not reasonably conclude that the at-large remedy—or pardon me—that the maintenance of the at-large system was intentionally caused, because I did not think that the evidence supported that inference.

I did not think that inference could be drawn. Now, if you want to hypothesize, saying that because of this injury there should have been a remedy of district elections, then that is another point, and under the 1982 amendments to the Voting Act, I think that may very well be the case.

Senator KENNEDY. Well, it was because we went into an effects test. But we do not want to leave the record to suggest that you remanded for further proceedings. You affirmed the earlier decision. You could have remanded for further proceedings which——

Judge KENNEDY. Well, I was a single judge. I did not have the dispositive power over the judgment.

Senator KENNEDY. Let me go into, again, this question about a different type of discrimination. We talked about it, briefly, yesterday, and that is the whole question of stigmatization and invidious discrimination, particularly with regards to women in our society.

And we addressed that issue as it related to your former club memberships, and I do not want to go back over that ground. But I want to get back to what you think is necessary in terms of finding invidious forms of discrimination, again against a background where we have seen, with regards to women and minorities, that issues of discrimination are now much more sophisticated.

They certainly have become so in recent times, and I think the American people understand that. Now as a practical matter, blacks were excluded from the Olympic Club because of their race, or sex, and during our discussion yesterday, you agreed that it is stigmatizing for a woman to be excluded from a club where business is conducted.

In fact you said it is "almost Dickensian" and inappropriate, but, at the same time you indicated that in your view—and I quote: "None of these clubs practiced invidious discrimination."

Now the Bar Association, in its commentary, does not require that there actually is an evil intent, in its restrictions of membership in various clubs. And I am just wondering whether you think that there can be invidious discrimination—without trying to reach back into the mind of the particular drafters of a statute, or by-law, or regulation—whether the effects of that type of a by-law, or regulation or statute effectively can discriminate invidiously, or whether you find that you have to go back to the mindset of the individual who either voted for or drafted that particular by-law or statute?

Judge KENNEDY. Invidious is the term that the ABA used, and it is the term that the Judicial Ethics Committee uses as well.

It is not a term that so far as I know has a meaning that has been explored in the case law, and therefore, it is somewhat imprecise. I think that the dictionary definition would be evil or hostile.

Senator KENNEDY. I have got it here. I do not want to be spending the time on it, but you know the point I am driving at.

Judge KENNEDY. The law in torts says that you can be charged with the natural consequences of your own acts. It is clear, to me, that if a discriminatory barrier exists for too long, if it is visible, if it is hurtful, and if it is condoned, that the person who condones it can be charged with invidious discrimination. I would concede that.

Senator KENNEDY. I think I will leave that there.

Let me go on to another area, if I could, that involves both the availability and the sensitivity and the usefulness of statutes and laws to correct wrongs. What I am talking now is access to the courts.

I am sure all of us understand the importance of having our day in court. It is part of our national heritage, but courts are especially important for those that lack the financial resources and the skills to be able to protect their rights. So as you know, class actions are often a means used by large groups of victims to pool their resources and bring a lawsuit for the benefit of all the members of the class. It may be women, it may be blacks, it may be senior citizens in terms of Social Security, which we saw reflected during previous nominations.

In a decision in 1982, in the *Pavlak* v. *Church* case, you held that the fact that a motion to certify a class action was pending did not stop the clock from running on the statute of limitations on the claims of members of the class. The approach you took would severely undercut the usefulness of the class actions because each victim, effectively, would have to file intervention papers in the class action in order to protect his or her rights if the courts denied the motion to certify the class.

So in the hypothetical employment discrimination suit I referred to, every person who was discriminated against would have to file intervention papers. They, in effect, would have to get a lawyer and file in case the court decided not to treat the case as a class action.

Now, the Supreme Court in 1983 vacated your decision because in two cases that year the Supreme Court unanimously rejected the view you expressed.

Would you address the concern that your decision in the *Pavlak* case reflects a very technical and narrow view in terms of the access to the courts to American people, who may be poor or handicapped?

Judge KENNEDY. To begin with, you have to remember that the class action failed there. So the question is whether a person who has an individual injury can sue.

Senator KENNEDY. That is right.

Judge KENNEDY. And the Supreme Court decision does make it easier for those persons who are injured to file an individual suit after the class has failed.

Senator KENNEDY. Right.

Judge KENNEDY. Our concern was that by the pendency of the class action, of course, the defendant has an open-ended contingent liability, and there is some interest in terminating those contingencies and in encouraging people with individual claims to come forward so the defendant knows what it has to defend against.

Senator KENNEDY. Sure.

Judge KENNEDY. And in this case, the plaintiff did not seek to intervene even after the court gave leave to intervene. The court gave leave to intervene at the conclusion of the class action, and the plaintiff did not. That was our rationale for saying that the statute has run. I certainly do think it is a close case, and I am quite willing to accept the decision of the Supreme Court. I forget

where the other circuits were on that point. I think we followed the decision of the second circuit, but I am not sure.

Senator KENNEDY. This is with regards to whether you have got individuals who have a grievance, and they are trying to find out if there is going to be certification of a class action.

Judge KENNEDY. Yes.

Senator KENNEDY. That request or certification can be denied for any number of reasons—the size of the class dissimilar interest, any number of different reasons for which a class action, as I understand, can be dismissed. And we are talking about the statute of limitations, for example, that in some instances are not 7 years, but 60 or 90 days. Fair housing is 120 days. So we are talking about a relatively short period of time in areas, particularly in the area of housing, where there are some very serious, egregious situations and where this may have a significant effect. I hear your reasons for it.

Let me ask whether these narrow rules really effectively have a booby-trapping effect on individuals. Just again on the issues of the statute of limitations, in *Koucky* v. *Department of Navy* in 1987, you affirmed a lower court decision dismissing a handicap discrimination claim against the Navy on statute of limitation grounds because the complaint, that was filed on time, named only the Department of the Navy, not the Secretary of the Navy, as required by law.

Similarly, in *Allen* v. *Veterans Administration,* you affirmed a district court order dismissing a suit on statute of limitation grounds because the papers, filed on time, named the Veterans Administration, rather than the United States, as the defendant.

What I am looking for is some assurance that these and other cases do not reflect any predisposition on your part to look for ways to keep worthy cases out of court.

Judge KENNEDY. They do not. If you will look at our opinion in *Lynn* v. *Western Gillette,* I am tempted to say, you will see that I was quite capable of giving a generous interpretation to a statute of limitation in a Civil Rights Act case.

The claims cases you mentioned against the Government are ones where I wish the Congress would pass just a little bill——

Senator KENNEDY. That is asking a lot.

Judge KENNEDY [continuing]. To clean up the statute of limitations law. I could write it for you on the back of an envelope during a recess. We have been pleading with the Congress for years to give attention to this, to what we consider to be as the law of our circuit—the mandatory rule that you have to serve two different people. It is a trap. There is no question it is a trap. It is also, Senator, the law.

Senator KENNEDY. Well, I thank you. I would be interested in your recommendations on it, and I know that the time is flowing down. But at least in these cases affecting minorities, affecting the handicapped, affecting access and discrimination, we welcome your response. I think the real question that certainly members hear across the country, which is the most important aspect, people want to know whether—not only as a nominee, but should you be confirmed—whether you are going to live by those four words that are above the Supreme Court, which you know so well, and that is

"Equal Justice Under Law"; and whether they are going to feel, particularly those that have been left out and left behind, that in Justice Kennedy they are going to have someone that will not be looking for the technicalities and the narrow and crabbed or pinched view of a particular statute, but a justice who is going to be sensitive to the basic reasons for why that statute was passed.

That is something that we will be making judgment on. I do not know whether you care to comment.

Judge KENNEDY. Well, thank you, Senator. I think it is an important part of the advise and consent process that you make the judge aware of your own deep feelings and sensitivities. I would say that if I am appointed to the Supreme Court and I do not fully meet the great proclamation that stands over its podium, that I would consider that my career has not been a success.

Senator KENNEDY. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

The Senator from Wyoming, Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman. First, Mr. Chairman, let me say that yesterday I mentioned—and I want this very important matter to be heard—a group called the National Women's Law Center as a group who had spoken out against Judge Bork on issues of discrimination based upon sex, and that they had no men in their organization. That was incorrect and in error and unfortunate. The group was not the National Women's Law Center, which is a Washington, D.C.-based group. My confusion was occasioned by the fact that one lady named Marsha D. Greenberger is the managing attorney of the National Women's Law Center and a member of their board. She is also a member-at-large and on the letterhead of a group called the Federation of Women Lawyers Judicial Screening Panel, which is a Washington organization. My confusion was caused by that dual membership of this lady attorney on that National Women's Law Center and this Federation of Women Lawyers Judicial Screening Panel. This group, the Women's Law Center, did object to Bork, in fact, in a letter they stated that they had never before ever taken a position on a judicial nomination, but because of the extreme nature of Judge Bork's legal views and the dramatic effect on the rights of women, the center felt compelled to take that step.

But what I was referring to was the letter of the Federation of Women Lawyers with regard to Judge Sentelle where they were objecting to his being a member of the Masons because it was a male organization. I was saying there is the true irony because the letterhead of that group does not contain the name of any male.

Now, before sinking deeper into the morass there, I do indeed owe an apology to the National Women's Law Center. The remarks I made with regard to the Federation of Women Lawyers Judicial Screening Panel I would leave on the record, but I certainly want to apologize to the National Women's Law Center as an error on my part. I would like to clear that record, and especially to Marsha D. Greenberger. And my apology, surely due, is certainly hereby expressed, and I earnestly hope accepted.

With that, I shall move on.

Mr. Chairman, you know, regardless of what we say, sometimes the needle does get stuck here, and we have reviewed old ground,

the things we reviewed in the previous nomination: unenumerated rights, framers' intent, ninth amendment, rights of privacy, precedent, States' rights, antitrust, civil rights, freedom of press, speech, criminal law, equal protection, race and gender, gender discrimination, Establishment Clause, death penalty, congressional standing, judicial restraint, voting rights. The only one I do not remember was comparable worth. But we have, indeed, plowed old ground.

The CHAIRMAN. Sounds like the Constitution, Senator.

Senator SIMPSON. It does. Should be. Lively little place in here. But let us keep the record quite clear that we have all dabbled in just what we dabbled in before, and will again because that is our role.

So yesterday there was an interesting discussion on criminal matters. It did not come up as much in the previous hearings, but there were questions about imposing strict sentences on convicted criminals. I remember some of your comments on that. A tough one always for a judge. I know in my practice when the trial was ended and the sentence awaited, and the jury, having concluded their deliberations or a non-jury case, the sentencing was always the troublesome part for the judge. You know, those are the ones, as they say, that keep you up at night.

But, anyway, you referred to that. We have just grappled with technical amendments to the sentencing guidelines legislation which established uniform sentencing for criminals across the United States. That was somewhat controversial. Senators Thurmond and Kennedy worked many years on the criminal law, sentencing guidelines, those things. The sentencing guidelines were designed, or at least we believe that they will work to bring uniformity in the sentencing of white collar criminals—white collar crime, more specifically—one that was tough to get at.

There is a widespread public perception in society that white collar crime does not receive the same degree of strict sentencing which other crimes receive. I would appreciate having your comments on the importance of sentencing in the area of white collar crime as it is in this country today.

Judge KENNEDY. White collar crime, as I have indicated in the initial exchange with Senator Metzenbaum, is, I think, an unfortunate term. It sounds as if it is a clean crime, which is, of course, a contradiction in terms. White collar crime can rob people of millions of dollars just as effectively as a person with a gun. I know bank officers who have congratulated me for my tough stance on crime because we put away bank robbers, but then they will turn around and they will, for fear of publicity, not prosecute one of their officers who has embezzled $50,000. I think that is wrong.

White collar crime is very, very dangerous, particularly in the consumer fraud area where people are deprived of their life savings. I think the courts should be very vigorous with respect to so-called white collar crime, and I wish we could find another aphorism that indicates that it is really a very, very ugly deed that we are talking about.

Senator SIMPSON. Yes, it is a tough one because it often arises from a position of trust to embezzlement and other aspects of that crime.

Well, now I have a totally provincial question. I want to get right down to that. I would ask you about perhaps an expansion of your opinions on the importance of States' rights in the constitutional system. That is sometimes overused. I think we do overuse that; perhaps I do, too. "States' rights." But as a Westerner from the State of Wyoming, I think it is sometimes forgotten that here is a State of almost 100,000 square miles; 50 percent of the surface of it is owned by the Federal Government, and 63 percent of its minerals are owned by the Federal Government. In that State is 40 percent of the Nation's wilderness in the lower 48.

So we have continual conflict on States' rights when you have the surface of a State owned 50 percent by the Federal Government. That means it belongs to the people of the United States and not to the people of the State of Wyoming. So I have this abiding interest in the opportunity for states to determine their own destiny on a multitude of issues without intrusive interference from the Federal Government, recognizing, of course, the federal nature of the public lands—or the public nature of the federal lands might be a better way to say it.

Could you give me your philosophy briefly regarding that general issue of States' rights and the reservation of power to the States under the Constitution?

Judge KENNEDY. Federalism is one of the four structural components of the Constitution. The framers thought of it as really one of the most essential safeguards of liberty. They thought that it was improper, that it was spiritually wrong, morally wrong, for a people to delegate so much power to a remote government that they could no longer have control over their own destiny, their own lives. That is the reason for the states.

The framers were very concerned that the sheer problem of geographic size would doom their experiment in a republican form of government. Their studies had taught them that the only successful republican form of government or democracy would be a small city-State. In those times, there were great diversities. One of the framers at the convention from South Carolina said the differences that divided his State and Maine and New Hampshire and Massachusetts were greater than those that divided Russia and Turkey. And he might have been right.

The CHAIRMAN. Senator Kennedy and Senator Thurmond, thank you.

All right.

Judge KENNEDY. That is the purpose of the Federal system, and it is the duty of all the branches of the government to respect the position of the place of the states in the Federal system.

As I indicated yesterday, there are no automatic mechanisms, or very few, in the Constitution, to respect the rights of States. You can read all through the Constitution and you will see very little about States.

This indicates, I think, that we have a special obligation to ascertain the effects of national policy on the existence of State sovereignty.

Senator SIMPSON. Obviously, you have made several references to the history of the Court, the history of the Constitution, the Constitutional Convention. That has been most interesting to me.

Obviously, you enjoy reading and studying Supreme Court history; is that true?

Judge KENNEDY. Yes, sir.

Senator SIMPSON. I would think that would be a tremendous asset to any Supreme Court Justice to have that appreciation and flavor of the historical analysis of the Court before a judge would go on that court.

I am going to conclude with a question. I remember that Senator Humphrey waived his whole stack of comments yesterday—and in accordance with trying to get the job done, I am going to conclude.

And you have been very good, Mr. Chairman, at accelerating things, and I hope we can continue to do that.

But let me ask you this, Judge. In your knowledge of the history of the Supreme Court, and reading of it, have you come upon a favorite among Supreme Court justices down through history, those who have served, one on whom you might lavish just a little extra ration of praise among all the remarkable men who have served?

I would be interested if you do have such a preference for a person?

Judge KENNEDY. I've sometimes tried to make up all-star lists of the Supreme Court. I will usually just put on seven in case somebody else has their favorites.

Chief Justice Marshall foresaw the great destiny of this country. He knew the necessity for a national government.

He had a power and a persuasiveness and a rhetoric and a morality to his opinions that few other justices have ever possessed. He went to law school for just 6 weeks. He had a remarkable grasp of the meaning of government and the meaning of the Constitution.

The two Justice Harlans, the Justice Harlan in *Plessy* v. *Ferguson,* and the Justice Harlan of the not too distant past, were great, great judges because of their understanding of the Constitution.

Brandeis, Cardozo and Holmes sat on the same Court, and were some of the greatest justices who ever sat on the Court.

And one of your colleagues, one of your predecessor colleagues, Hugo Black, was one of the great justices of the Court. He had a hideaway office somewhere here in the Capitol, and he would read Burke and Marx and Hume and Keynes and Plato and Aristotle during the Senate's sessions.

He was simply a magnificent justice. He carried around, as many of you know, a little pocket copy of the Constitution at all times, in case he was asked about it, a habit that has been emulated by many of his admirers.

Those were all great men in the history of the court, Senator. To talk only of those who are not living.

Senator SIMPSON. Well, that is fascinating. Now, instead of reading those things, we read stuff from our staff while we are squirreled away in some warren somewhere.

And maybe we ought to go back to some of those treatises in every way.

A Wyoming man served on the Supreme Court, Mr. Van Devanter.

Judge KENNEDY. Mr. Justice Van Devanter. He was one of the greatest justices on the court for achieving a compromise among the justices.

When they were searching for a common point of agreement, Mr. Justice Van Devanter could find it.

He did not produce a lot of the opinions of the Court, because he found it very difficult to write; he was a slow writer.

But he was valued very, very highly by all of his colleagues.

Senator SIMPSON. That is very interesting. Thank you so much, Judge.

Judge KENNEDY. Thank you, Senator.

The CHAIRMAN. Let me ask you a question about history, and I am not being facetious when I ask this.

Didn't Justice Black, when he was Senator Black, also carry a book with a list of all his supporters and contributors? A little book?

I am told that Justice Black, when he was a Senator, literally carried a book—was it Black? He was Senator Black from Alabama that had a list of all his supporters.

So every county he went into, he would take out his little book. And he would know exactly who had helped him in the previous election. He carried that with him all the time, I was told.

Judge KENNEDY. I am not aware of that. He was from Clay County in Alabama.

The CHAIRMAN. Maybe our Alabamian at the end of the row could clarify it when we get to that.

Senator HEFLIN. It would have had to have been the Encyclopedia Britannica.

The CHAIRMAN. Well, I was told it was his contributors, but I will move on to the great State of Vermont. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. I do not want to delay, but when Judge Kennedy and my friend Al Simpson talk about Hugo Black, I remember when I was in law school. I'm sure you remember a lot of things about law school, we all do, but for me one thing really stands out the most of all the matters in law school. Because we were right here in town, Georgetown, the law school, decided to have a luncheon inviting all the Supreme Court justices. They all accepted on one condition: there not be a head table. We were going to be in a bunch of small, round tables, and it would be run by either the student bar or something of the law school. They would draw lots, and different justices would sit at different tables. And that was the only way they would do it, so they could sit with the students.

So we drew lots, and I ended up sitting next to Justice Hugo Black whom I had never met but just seen in the Court. And at the last minute one of the other students was sick. My wife came with me. And it was the most fascinating thing in 3 years of law school. He had no idea I was going to sit there. I mentioned I was from Vermont. And he said, oh yes. He said, Franklin—the first time he said it, I didn't realize he meant, of course, President Roosevelt—he said, Franklin sent me to Vermont to campaign during a contested election.

He told me the towns he went to—this was back in the 1930s. Who he campaigned for. And what the votes were, the numbers.

We went back and checked with the Secretary of State's office subsequently, and he was absolutely right. Remember, they picked their lots as they came in, and ended up at their particular tables.

But during the course of the thing, a couple of times when questions came from different students, the hand went to the inside pocket. Out came the copy of the Constitution. It was more worn than the one I carry. And he would refer to it.

And it was a remarkable experience. I felt that it was worth at least one full year of law school, that one luncheon, just listening to this man.

Senator HEFLIN. He had a remarkable memory. He could remember the score of every tennis game that he beat me. [Laughter.]

Senator LEAHY. Well, that really was not fair, him beating you, because he was younger, wasn't he, Senator Heflin?

But let me just go back, and I will try to brief but to go back to this morning. You have been asked a lot of questions about your views on privacy, and you have answered me and other Senators.

And those answers appear to establish that you recognize the protection of privacy as a value that the country should enforce in constitutional litigation, even though the word, privacy, is not mentioned in the Constitution; even though the boundaries of privacy or of the right to privacy may be unclear. Nobody is asking you to say here today just where those boundaries are, nor I suspect from your testimony, do you feel that anybody could say today just where those boundaries are. Am I correct so far?

Judge KENNEDY. I think that is correct, Senator.

Senator LEAHY. You have also said that there are other rights not specified in the Constitution that you think the courts can enforce. You have given some clue as to where you go to look for those—to history, precedent, national values.

Now, let us turn to an area where the issue is not what unenumerated rights should be recognized, but what the specific bill of rights means, and that is the area of criminal law.

You have ruled, as I read your cases, you have ruled for the defendants in about a third of the criminal cases you have heard. You have done it for the government in about two-thirds of the cases. And going down—and I'm not suggesting anything by that number. One of the nice things about being a prosecutor rather than a defense attorney is that prosecutors win most of their cases, if they are at all smart about what they bring, and defense attorneys, by the same nature, would have to lose most of them.

You gave a speech at McGeorge Law School in 1981, a commencement address, and you said, and I quote: "We encourage debate among ourselves and with anyone else on the wisdom of the rules we adopt. I question many of them myself. For instance, some of the refinements we have invented for criminal cases are carried almost to the point of an obsession. Implementing these rules has not been without its severe costs."

Now, are you referring when you talk about the point of obsession to some of the detailed refinements that have been made in the application, for example, of the fourth amendment to warrantless searches?

Judge KENNEDY. Well, I suppose I had the fourth amendment in mind generally. This is pretty broad rhetoric.

With the fourth amendment, we have, as I have indicated, extracted a tremendous cost for putting the system in place.

Now that it is in place, it works rather well if it has a pragmatic cast to it. That is the purpose of the good faith exception. Whether the good faith exception is going to be so broad that it will swallow up the rule remains to be seen.

Senator LEAHY. Well, let me go into that a little bit. Because, again, thinking of days when I was a prosecutor, I might chafe a little bit at the idea of the exclusionary rule, but I also realized, and anybody in law enforcement has to be honest enough to realize, that absent the exclusionary rule, there are some groups within law enforcement that would just push things as far as they could.

Most of the better trained, better equipped, either State or local police, or groups like the FBI, have been able to work well within the confines of the exclusionary rule.

But on good faith--well let me just back up and make sure I understand this. You do not feel the exclusionary rule by itself is a mistake; is that correct?

Judge KENNEDY. Now that it is in place, I think we have had experience with it, and I think it is a workable part of the criminal system.

Senator LEAHY. But you do not----

Judge KENNEDY. If it is administered in a pragmatic and reasonable way.

Senator LEAHY. Now, I realize this is jumping to quite a hypothetical. But you do not see yourself as being one, back at the time the exclusionary rule came in, of being the one to be at the forefront initiating the exclusionary rule?

Judge KENNEDY. I am not sure I understood your question, Senator.

Senator LEAHY. Well, you say, the exclusionary rule, now that it is in, you accept it.

Judge KENNEDY. Yes.

Senator LEAHY. But I take it by that you do not think you would have been the one to have been the first person to have put the exclusionary rule in?

Judge KENNEDY. Well, I did not mean to imply that. I think that the courts were generally concerned that there was a lack of any enforcement of that provision.

Senator LEAHY. Well, you said in the *Harvey* case, *U.S.* v. *Harvey*, "the court has the obligation to confine the rule to the purposes for which it was announced."

How do you see those purposes?

Judge KENNEDY. The purposes are in the nature of a deterrent. The purpose of the exclusionary rule is to advise law enforcement officers in advance that if they do not follow the rules of the fourth amendment, the evidence they seize is not going to be usable.

Now if the rule goes beyond that point, and a police officer in all good faith, after studying the rule, makes a snap decision that a warrant is valid, or a considered decision that a warrant is valid, then I think the system ought to give some recognition to that reasonable exercise of judgment on his part.

Senator LEAHY. But you do accept the idea that the expansion of that good faith exception could, to use your term, swallow the rule?

Judge KENNEDY. That could very well happen. And it remains to stake out the proper dimensions of that rule—of that exception.

Senator LEAHY. I understand. And is that an appropriate place for the courts to act, in staking out those parameters?

Judge KENNEDY. The courts must act there, because it is their rule.

Senator LEAHY. Thank you. There are areas where legislatively—well, I don't want to go into that.

Let me ask you about the sixth amendment right to counsel for criminal defendants. Is that a principle that has been taken to the point of obsession?

Judge KENNEDY. No. Although there may be cases where the right—no, I think not.

Senator LEAHY. Let me just make sure I understand. *Betz* v. *Brady*, right to counsel in federal felony cases. You have no problem with that?

Judge KENNEDY. Well, no, and of course that is pre-*Gideon*.

Senator LEAHY. And you have no problem with *Gideon*?

Judge KENNEDY. No.

Senator LEAHY. Even though that, some could say, erodes independent State law. You have no problem with *Gideon* v. *Wainwright*?

Judge KENNEDY. Well, as a general proposition of law, it is accepted. I know of no really substantial advocacy for its change.

Senator LEAHY. *Miranda*. How do you feel about *Miranda*?

Judge KENNEDY. Well, we are going down the line here. The *Miranda* rule, it seems to me, again, we have paid the major cost by installing it.

We have now educated law enforcement officers and prosecutors all over the country, and it has become almost part of the criminal justice folklore.

Senator LEAHY. And you do not have any problem with that now?

Judge KENNEDY. Criminal justice system folklore. Well, I think that since it is established, it is entitled to great respect.

Senator LEAHY. I suspect a sigh of relief might be given by most police officers. I can't imagine a police officer anywhere in the country who doesn't have the card.

Judge KENNEDY. That is a remarkable example of the power of the courts. And it is a reason for judges reminding themselves that they should confine their rules to the absolute necessities of the case.

Senator LEAHY. Do you want to expand on that? Did they confine themselves that time?

Judge KENNEDY. Well, the *Miranda* rule, as I said, is in place. It was a sweeping, sweeping rule. It wrought almost a revolution.

It is not clear to me that it necessarily followed from the words of the Constitution. Yet it is in place now, and I think it is entitled to great respect.

Senator LEAHY. Well, one couldn't say it followed the absolute necessities of that case, could you? Even with the confusion that still existed following *Escobedo*?

Judge KENNEDY. That is right. I think it went to the verge of the law.

Senator LEAHY. I often ask myself whether it would have if *Escobedo* had not preceded it——

Judge KENNEDY. Yes.

Senator LEAHY [continued]. Which caused all kinds of confusion. I mention that only because there is the flip side of it. *Escobido*, I thought anyway, left a lot of confusion as to just what you are supposed to say and everything else. And *Miranda*, I happen to agree with you, went way out there.

But I wonder if it was not a practical reality, because the Court had to know that there was confusion from *Escobedo*. And the confusion was laid down with the little card that one could carry out of *Miranda*.

Judge KENNEDY. Well, the merit of simple rules is that they are workable. Their vice is that they may go beyond the necessities of the case.

Senator LEAHY. And you think in this case they may have?

Judge KENNEDY. I think they may have, yes.

Senator LEAHY. Thank you.

Let me just ask you just one last area. It goes into what has to be the hardest and loneliest duty of a Justice of the Supreme Court.

Now you act as a circuit justice. Every Justice of the Supreme Court gets the ability to act as a circuit justice. You have authority to act alone without the other justices on emergency matters that come within the geographical circuit to which you have been assigned.

Now one of those matters, and it comes up often—it is almost impossible to go more than a couple of weeks without reading in the news—that someone on death row has filed a petition seeking a stay of execution.

Now, sometimes there are motions still pending in other courts and so on. But let us take the instance of death warrants issued by the governor. The lower courts have refused to suspend them. Other courts are in recess. You're back home, and it is hours before the petitioner or the prisoner is to be executed. You are at the end of the line. The decision is up to you. You have got a few minutes to make it.

Without going into a question of how you feel about the death penalty, how do you approach a decision like that?

Judge KENNEDY. Well, we have had situations like that where we have had single judges acting in single motions.

Senator LEAHY. In the ninth circuit?

Judge KENNEDY. Yes, sir. The first thing you do is you take off your coat, and you sit down at the desk and you begin working it out. If there is merit to the claim you simply have to stop the execution until you get the information before you. You may end up increasing the suffering, and the aggravation, and the anguish of the defendant, but I just know of no other way to do it.

It happens with every single execution. The courts do not look good. We act with the appearance of feverish haste. The defendant, who has been sentenced to die, has his deadline extended again. But the law of this country is that the Supreme Court of the

United States exercises supervisory power over its circuits, and if that is what the jurisdiction is, the jurisdiction must be exercised.

Senator LEAHY. You are also saying that it is a case-by-case thing. There are no mechanical rules you can follow?

Judge KENNEDY. There are no mechanical rules. Now there have been suggestions by task forces that we have fixed points for cutting off any petitions, but the problem was always that there is new evidence and new argument, and I just do not know how to cut that off.

Senator LEAHY. So you do not agree with those task-force recommendations?

Judge KENNEDY. Well, they have not even come out with anything, that I have looked at, that looks very solid.

Senator LEAHY. It would be kind of hard to do it, wouldn't it?

Judge KENNEDY. Yes.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. We will now go to Senator Grassley, and after that, Judge, we will give you an opportunity to get up and stretch your legs, and break for 15 minutes.

Judge KENNEDY. Thank you, sir.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Kennedy, several times you have spoken of the tension between order, on the one hand, and liberty on the other. Constitutional scholars often speak of the tension between our American ideal of democratic rule and the concept of individual liberties, and we often refer to this as the "Madisonian dilemma."

The U.S. was founded on a Madisonian system, one that permits the majority to govern in many areas of life, simply because it is the majority. On the other hand, it recognizes that certain individual freedoms must be exempt from being trampled upon by the majority.

The dilemma is that neither the majority nor minority can be fully trusted to define the proper spheres of democratic authority and individual liberty.

First, could I have your assessment of this "Madisonian dilemma." Would you agree that there is a tension there?

Judge KENNEDY. Well, I am not—of course order and liberty can be set up on a polar spectrum, but I think it was Mr. Justice Reed who said that, "To say that our choice is between order and liberty is an act of desperation." You may have order and liberty, and without both you only have anarchy. That is my addition.

Senator GRASSLEY. It is at least unavoidable?

Judge KENNEDY. Pardon me?

Senator GRASSLEY. The tension there is at least unavoidable?

Judge KENNEDY. The tension does seem to be unavoidable.

Senator GRASSLEY. Well, given the fact that there was very little debate during the Constitutional Convention of 1787 over the whole subject of the judicial branch, it seems somewhat unclear that the framers envisioned the leading role for the judiciary in the resolution of this dilemma.

After all, you will recall that Alexander Hamilton spoke of our judicial branch as the "least dangerous" branch, having "neither force nor will, only judgment."

And over time, of course, people have come to assume that it is the job of the judiciary, particularly the Supreme Court, to decide how to resolve the tension.

I assume that you agree with this role for the third branch, correct?

Judge KENNEDY. Well, I am uncomfortable with saying that the judicial branch has assumed a role that was not intended for it by the Constitution. On the other hand, we have to recognize that immediately after the Hamiltonian structure and the Madisonian—it was really a Hamiltonian structure that was in place—we had a Jeffersonian Bill of Rights added onto it.

And so, from the outset, we built in a tension, and the framers did not pay very much attention to the courts, Senator, and I am not quite sure why that is. Perhaps it is because they never conceived of the courts exercising the broad jurisdiction, the broad authority to announce the law that they now have.

I am just not sure why. It is fascinating. They distrusted the legislature. You have bicameralism as a principal check, and, of course, the President, and there are very few checks on the courts. And so that is why it is important for the court to check itself.

Senator GRASSLEY. I think you are telling me that there is a role there for the Court in solving that, "Dilemma," and you see that as a proper role?

Judge KENNEDY. I do. Yes, sir.

Senator GRASSLEY. Some judges and scholars believe that in resolving the "dilemma", that courts' obligation to the intent of the Constitution are so generalized and remote, that the judges are very free to create a Constitution that they think best fits into today's changing society.

Now I am not saying that that is your approach, but I want to know what you think of that approach, because there are scholars who believe it and there are people that practice it?

Judge KENNEDY. I think when a judge defines, or articulates a constitutional principle, he should find very, very convincing and authoritative evidence to support his, or her, conclusion.

Senator GRASSLEY. So then you would take some exception to some scholars' beliefs that the courts are free to create a Constitution that best fits today's needs?

Judge KENNEDY. I could not accept that formulation as being consistent with the Court's role in the constitutional system.

Senator GRASSLEY. Let me illustrate what happens, then, when Justices are not faithful to the original understanding of the Constitution, due to over-generalization, like I just expressed.

Justice Brennan has characterized the Constitution as being, quote, "pervasively concerned with human dignity," unquote. From this basic point, he creates a more general judicial function of "enhancing human dignity", even when it is contrary to the intent of the framers.

The problem with this theory is that every Justice's concept of human dignity is very personal with the thought process of that individual.

Judicial discretion becomes, "untethered." It becomes a matter of each Justice adjudicating according to some personal bias or belief, not the Constitution.

Would you agree with that?

Judge KENNEDY. I would agree; I had an exchange with Senator Humphrey just before the luncheon break in which we were discussing the categories that a judge might look to in order to determine whether there was a privacy claim, and it occurred to me, as soon as I concluded my answer, that I had made an assumption but had not stated it.

And the assumption is we are doing this in order to determine if this fits with the text and the purpose of the Constitution. That is why we are doing it. We are not doing it because of our own subjective beliefs. We are not doing it because of our own ideas of justice.

We are doing it because we think that there is a thread, a link to what the framers provided in the original document.

Senator GRASSLEY. Permit me to continue with the practical application of Justice Brennan's theory of constitutional interpretation.

Brennan finds that capital punishment, even for those who commit the most heinous crimes, violates the Constitution, because capital punishment, to him, falls short of his "constitutional vision of human dignity."

I disagree with Justice Brennan. First, because I believe that capital punishment is explicitly authorized by the Constitution. There are four or five references to capital crimes or the loss of life in the Constitution. I also have a problem with this type of constitutional analysis—Justices generalizing from particular clauses and then applying the generalization instead of the clauses.

Can you comment on this theory of constitutional analysis—a theory that permits the creation of rights so general as to give courts no guidance in how to interpret them?

Judge KENNEDY. As you have stated it, that, it seems to me, would be an illicit theory.

Senator GRASSLEY. If I could, I would like to turn to the subject of the legislative veto. You and I discussed it briefly in my office. You know of my interest in it, and you have written on the subject at least in one outstanding case.

Perhaps your most significant ninth circuit opinion is that one striking down the legislative veto in the *Chadha* case, in 1980. This opinion was affirmed and expanded upon considerably by Chief Justice Burger 3 years later.

I have a real interest in the legislative veto. Senator DeConcini of our committee, Senator Levin, and I and others have introduced legislation to revive the legislative veto as a check on the bureaucracy that over-regulates our lives.

And I am sure you are aware of all the business people in America who are complaining about too much government red tape, or the taxpayer that has been abused by the IRS.

So I have a series of questions on both the constitutional and practical dimensions of the legislative veto.

You would agree that federal agencies, which are routinely delegated legislative or quasi-legislative power, may issue regulations having the force and effect of law, without bicameral approval or presidential signature, isn't that correct?

Judge KENNEDY. Well, that is the existing law, and we had a colloquy earlier this morning in which I indicated that this is a rather

untidy area of the Constitution, so far as explaining the justification and the constitutional bases for administrative agencies.

I think most of us recognize their necessity, and there is no question that agencies make law. We cannot avoid that fact. And so I think I would say that I do agree that that is what happens.

Senator GRASSLEY. Would you also agree that sometimes these regulations can be excessive, burdensome, ill-advised, or just plain wrong-headed?

Judge KENNEDY. Yes, and I could say the same things about decisions of courts. I agree.

Senator GRASSLEY. Well, if agencies need not satisfy the article I requirement when they pass something that is wrong-headed, or however you want to characterize it, why, then, is the Congress's mere reservation—just the mere reservation of a veto subject to a more exacting article I test?

Judge KENNEDY. I thought that this was a tremendously difficult problem in the *Chadha* case. In the *Chadha* case, there was an adjudication of an alien's status, and he was granted leave to remain in the United States on the grounds of extreme hardship.

They made an adjudication in an individual case. One House of the Congress, the House of Representatives, for no given reason, attempted to cancel that and he was to be deported.

We found, in the ninth circuit, that this was impermissible, that this was an interference with the core function of the executive branch, and also with the judicial branch.

The opinion was written very narrowly because we reserved the question of whether or not the Congress might have a veto mechanism over the rulemaking functions of agencies. We did not think that case was presented and we thought that that might present different considerations.

Now we recognized, of course, that any broader formulation than the one we adopted would strike down 250 statutes, and we thought that one was enough for that opinion.

The Supreme Court did affirm our court, but I have to say, on a different rationale. The Chief Justice, writing for the court, invoked the presentment clause and thereby I think pretermitted any evaluation of a one-House veto over rulemaking, and we did not come to that conclusion.

But that is the law, and the Supreme Court has handed down the *Chadha* case, and I think that legislative veto in one House, or both House vetoes—-

Senator GRASSLEY. Do you think there is any way to validate the legislative veto through the use of the doctrine of original intent?

Judge KENNEDY. Yes. I tried to find that. You know, it can work both ways for us, Senator. We do not always find the answer we want. I read all of "The Federalist Papers." I read everything I could find that Madison had written.

I read what Jefferson had written, even though he was not at the Convention. I concluded that, in this case, the veto mechanism did violate the express intent of the framers.

And it is a good example of the fact that the Constitution can teach you something.

Senator GRASSLEY. I think it is important that we look at what the framers actually said in "The Federalist Papers" about the im-

portance of bicameralism. But could they have intended this result?

It seems to me that the framers were very practical politicians. They knew how to resolve political dilemmas, and that is why the Federal Government was chartered with a great deal of flexibility.

I do not think they could have foreseen in 1787 what would be developing in a modern government; that there would be whole industries to regulate, consumers' and investors' interests to be protected, government benefits to be distributed, and so on. We could make a longer list than you or I want to make, of all the things that government is involved in today.

If they had known this, do you really think that they would have intended every bit of legislation to be done in this "civics-book" fashion?

Judge KENNEDY. Well, you are asking me for my legal opinion. In the case that we wrote, we found sufficient differentiation between an adjudicatory proceeding, on one hand, and generic rulemaking, which is what you are describing on the other, to confine our case to the former. I thought that the situation you described, with generic rulemaking, might present a different constitutional problem.

Senator GRASSLEY. Doesn't this really get us back to the issue of how to find the original understanding

Judge KENNEDY. I think it is a good example of it, Senator, and it is one in which I thought the Constitution spoke rather clearly against interference with the core function of another branch of the government.

I thought that the legislative veto in *Chadha* was violative of the provision of separation of powers, and I made it clear that the legislative veto, in other instances, might not violate that separation.

What you had in *Chadha* was one of the highest officers in the executive branch of the government, making a determination in his executive capacity It was followed by court review or the possibility of court review, and, for one House of Congress, without reason, to simply upset that adjudication, seemed to me to violate separation of powers, and we so held.

Senator GRASSLEY. Judge Kennedy, on at least a couple of occasions, Justice Rehnquist has suggested that Congress has unconstitutionally delegated responsibilities to federal agencies.

As you know, with the creation of the "modern administrative State", no federal statute that I know of, in the last 50 years, has ever been invalidated on the grounds that the congressional delegation to the agency was too broad.

Do you think the Supreme Court ought to revive the so-called "non-delegation" doctrine, which was last used to strike down some of the New Deal legislation?

Do you see any possibilities in that area, following Rehnquist's view, at least?

Judge KENNEDY. Well, the non-delegation cases—and I think that is the right term to give them—seem to be lying dormant, don't they? And it is not clear, to me, the extent to which they still have vitality.

But these questions go very much to the core of the functioning of the Congress, and I think that the Congress must give very, very

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careful attention to how it can control the agencies that it creates. I think that problem is pointed up by the opinion of the Supreme Court, and of our own court, in *Chadha*.

Senator GRASSLEY. I would like now to turn to a different area.

Judge Kennedy, during the Bork hearings, much was made of the fact that many law teachers opposed Judge Bork's nomination.

In his writings, Judge Bork was very critical of the prevailing academic establishment which tended to have a liberal political philosophy.

Bork was critical of law professors who, once realizing that they could never convince democratic electorates to vote in their social policies, turned to judges as a fast way to make society over to their liking.

Of course I suppose wanting judges to do "good things," simply because the electorate will not do them, and do them quickly enough, is not limited just to liberalism, I will admit.

But I do sense an attitude among what I refer to as the "legal elites" of this country, that when the legislative process "malfunctions", judges ought to step in and deem themselves lawmakers.

That is why I am so concerned about getting someone who believes in judicial restraint on the Supreme Court. You have been a constitutional law professor for many years. Can you comment on your perception of the ideology that eminates from most law schools today?

Judge KENNEDY. Well, it might be somewhat presumptuous of me to characterize the legal education establishment nationwide in just a few words, particularly because I am a part-time law professor.

It is true that the law schools throughout the United States have a tremendous influence on the way our system works. There is a high degree of uniformity in law school teaching and in law school curriculum, and this has some great benefits. To begin with, lawyers are taught, in effect, a national language and this makes for a very, very efficient legal system.

The capitalistic system in this country, and the corporation system, was built by the legal profession. They are important as shipwrights were to England. And so the legal profession has, and the legal education system has presented a tremendous contribution to the capitalistic system of this country with the legal talent that it educates.

Now, on the other hand, with this uniformity we can create perhaps a lack of diversity, a lack of creativity. I don't see that in the law schools. I think individual professors are willing and able to explore their own philosophies in their own terms. But the danger is always there and I think law schools should be aware of it—the danger of uniformity.

Senator GRASSLEY. Well, regarding this "uniformity", tell me whether or not you agree that the prevailing judicial philosophy among many law professors is one that applauds judicial activism?

Judge KENNEDY. I am not particularly comfortable in making those judgments. I am certain that a number of law school professors do hold that view, but there are others who do not.

Senator GRASSLEY. Can I ask you then, in your own approach to teaching, how have you gone about teaching your students the activist decisions of the Warren and Burger courts.?

Judge KENNEDY. Well, as I indicated yesterday, I, within certain limits of tolerance, do not care what my students think. I do care passionately how they think. The method is the important thing. Each case must be justified according to logic, according to precedent, and according to the law of the Constitution, and I insist that each student do that for every case.

Senator GRASSLEY. Could I ask just one last question?

The CHAIRMAN. Surely.

Senator GRASSLEY. I don't think it is going to take a lot of time.

Have you challenged your students to question the rationale, the reasoning, behind the Supreme Court's most expansionist of decisions like the *Miranda* case, the *Griswold* case, and the *Roe* v. *Wade* case?

Judge KENNEDY. Yes. That is a routine part of the curriculum. It is a routine part of the exercise. Because if those decisions cannot stand rigorous analysis, then they can be called in question.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Before we break, Judge, as you can see, you are causing a dilemma for some on this committee. You are not turning out to be quite what anybody thought.

So with that, we will break for 15 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Judge, I realized as we broke you and others may have misunderstood my closing comment. What I meant to say was you are turning out not to be espousing the same philosophy that we heard before, and that is disturbing to some, reassuring to others, and confusing to still others; and you are turning out to be exactly what you advertised to be—your own man—and that is what I meant. I did not mean it in a way that was meant to be in any way insulting. I meant it in a complimentary way when I said no one knows for sure.

Judge KENNEDY. Well, thank you, Senator. I didn't take it in any other respect.

The CHAIRMAN. Now, before I yield to my colleague from Alabama, the Senator from Arizona would be the next to question, but he is tied up in a conference that is going on now which will determine when and if we, the Senate and the House, ever adjourn prior to Christmas. And he will, unless he is able to make it back prior to the closing out of your testimony, he ask unanimous consent that his questions be submitted for you to respond in writing.

Judge KENNEDY. I would be pleased to do that, sir.

[The questions for Senator DeConcini appear at p. 733.]

The CHAIRMAN. Without objection, that will be done.

Now, I yield to my friend from Alabama for his——

Senator LEAHY. Senator Heflin was gracious enough to say he would yield to me just for one follow-up question on an earlier point. I want to make it absolutely clear that I understood the answer.

The CHAIRMAN. Well, fine. The Senator from Vermont.

Senator LEAHY. Judge Kennedy, on *Miranda*—aside from whether you would have written in the opinion "here are the four warnings to give," do you agree that defendants should be warned of their right to counsel and their right to free counsel if they cannot afford it?

Judge KENNEDY. That, of course, is the law and I know of no strong argument for overruling the law that is now in place.

Senator LEAHY. And you agree with that right?

Judge KENNEDY. Well, I don't want to commit myself that I wouldn't re-examine it, but I think it would take a strong argument to require me to change it.

Senator LEAHY. Thank you.

Thank you very much, Senator Heflin.

The CHAIRMAN. The Senator from Alabama, Senator Heflin?

Senator HEFLIN. Judge Kennedy, you were a witness in a criminal prosecution against Judge Harry Claiborne, as I understand it.

Judge KENNEDY. Yes, sir.

Senator HEFLIN. Would you give us the circumstances pertaining to your appearance as a witness, how you were called and basically, in a thumbnail sketch, the facts?

Judge KENNEDY. Judge Claiborne was a U.S. District Judge in the District of Nevada. He was indicted and tried for various charges, one of which was the solicitation of a bribe from a former client of his. The former client of his was one Conforte who operated a brothel in Nevada known as The Mustang Ranch.

Claiborne had been Conforte's attorney when Conforte was charged by the U.S. Government for tax evasion. Conforte was convicted. Claiborne was not his attorney on the appeal because between the time of the ending of the trial and the taking of the appeal Claiborne became a judge.

Conforte's case was appealed to the ninth circuit. There was a three-judge panel consisting of Judge Tang, a United States Circuit Judge from Arizona; Judge Palmieri, U.S. District Judge from the Southern District of New York, sitting with us by designation; and me, and I was the presiding member of the panel.

During the oral argument of the case, the panel was quite vigorous in questioning the government, and it might have appeared to someone who was in the audience that the panel was quite concerned about the conviction and might be disposed to overturning Conforte's conviction.

The ninth circuit, because of its workload, historically has assigned district judges to sit with us on the circuit, and Claiborne himself, now a judge, had been assigned to our circuit and had sat with me a week earlier, and he subsequently sat with me a month later.

At the time he sat with me earlier, a week or so before, I was not aware that the *Conforte* case would come up and I had no idea that he was connected with it. When I sat with him a month later I suppose I was aware of it, but we certainly did not discuss it.

The allegation was that Claiborne solicited a bribe from his client of $50,000—I never did read the indictment—of a certain amount of money in order to influence the panel in its decision. Each of the judges on the panel, including me, testified to the fact

that Claiborne had not contacted us to influence the result of the case.

I did not hear the testimony. I was careful not to hear the testimony or read the newspaper accounts or even read the indictment. So my information on the case may not be even as good as someone who read the newspapers. But, as I understand it, the testimony was that Claiborne, the judge, had told Conforte, his former client, that Claiborne had met with Judge Palmieri in Judge Palmieri's apartment in New York. Judge Palmieri had never met the man, and so testified. All of us testified that there had been no attempts to influence us in the case.

I did say that Judge Claiborne, in a telephone conversation, with my clerk a party to the conversation, had asked when are you coming out with the *Conforte* case and I had said the case is under submission, which was a polite way of saying I am not talking about the case.

My testimony and the testimony of the other judges before the U.S. district court, which was now trying Claiborne for the bribery charge and for the tax evasion charges, was to outline the circumstances, to explain how the court of appeals works, to give background, and to give in a capsule—and to say what I have just told you in a capsule form.

The jury did not convict on any of the counts. It was a hung jury. Subsequently, Judge Claiborne was retried just for some tax evasion counts. They did not retry on this matter. And he was convicted in court and subsequently was impeached by the House of Representatives and convicted and removed by the U.S. Senate.

Senator HEFLIN. Well, you were called in by the government to testify largely as to how it worked, to deny this matter pertaining to approaches being made to the three-judge panel, and I suppose as to the inquiry as to when the *Conforte* case would come down. Is that basically correct?

Judge KENNEDY. Yes.

Senator HEFLIN. And you testified as a government witness?

Judge KENNEDY. Yes, I testified as a government witness in the case.

Senator HEFLIN. All right, sir. Now this brings up the issue of impeachment proceedings and the independence of the judiciary.

Judge KENNEDY. Yes, sir.

Senator HEFLIN. I know that Senator DeConcini will probably submit written questions to you pertaining to the Judicial Conduct and Disability Act of 1980, as I believe it was called, which was known as the DeConcini-Nunn bill, which deals with the activity of judicial councils and the circuits and the Judicial Conference I believe, and ultimately perhaps Congress' role relative to the impeachment procedure.

You opposed pretty vigorously in a 1978 speech to the ninth circuit judges the Judicial Conduct and Disability Act.

Judge KENNEDY. Yes, sir.

Senator HEFLIN. And I know that Senator DeConcini has told me that he appeared there with you and had quite a debate pertaining to that matter. You and I are on the same side. I voted against it and made a speech questioning its constitutionality when it was on the floor of the Senate.

But basically, I think you felt like it had some constitutional imperfections. Do you want to explain your opposition to that bill?

Judge KENNEDY. Yes, Senator. The bill, incidentally, in the form that it was initially proposed, the Nunn-DeConcini bill, and the form that we were concerned with in the Arizona debate was much more far-reaching than the bill that eventually was adopted. And that bill would have permitted a national committee of judges to inquire into the fitness and the behavior of any sitting U.S. judge, and I took, as did a number of my colleagues, the position that this was a serious threat to the independence of the judiciary.

The judges of the United States must be in a position where they can agree with each other and also disagree with each other very vigorously. And, if you are in a collegial body, and as you well know in the Senate, and you must constantly disagree and debate your colleagues, you need to rely on every bit of decorum, every bit of tradition, every bit of courtesy, every bit of etiquette that you can summon in order to maintain your professional friendship with each other. And we felt that this was one of the serious defects of Nunn-DeConcini. That it would set judge against judge in an arena where previously the Constitution had committed that responsibility solely to the U.S. Senate, and those were some of the grounds of our opposition to the bill.

Senator HEFLIN. Well, does testifying against a judge pit one against another?

Judge KENNEDY. Well, I suppose it does, although there, in the context where we were called as witnesses for the government, it was not as if we, the judges, were bringing the case.

Senator HEFLIN. After the Claiborne matter was heard by the Senate and he was impeached, a number of Senators felt that the procedure was cumbersome and perhaps may even lack some due process, in effect, the jurors being the members of the Senate, hearing evidence, hearing arguments, absences, and many of them having to do just like we are doing now, where people have to be at conferences. Very important issues are up on the legislative basis. They have their staff there but in some of the proceedings in the Senate, some of the arguments were done in secret, in closed session, and none of the staff was present.

Do you have any thoughts on whether or not the impeachment procedure that is followed under the Constitution needs changing or needs some fine tuning, or a different method, perhaps looking at what some of the States have done relative to the issue of discipline and removal of judges?

Judge KENNEDY. The framers were very deliberate about this decision, as you well know, Senator, and what have there been? Something like, I am tempted to say nine impeachments before Claiborne. There have been ten impeachments and five convictions, or something like that, in the history of the United States. There have been about 10 or 12 other instances where the Senate was about to convict and the judge resigned.

I adhere to my view that the existing constitutional system should be maintained. I am a little cautious about commenting at length on your impeachment procedures for two reasons: one, because I haven't given the matter much thought; two, because there

is a case in the courts now involving a judge and it is likely to come before the Supreme Court.

I think we can say that most of the commentary in the literature has been that the design of the impeachment trial process and its conduct is for the Senate to decide, guided by the managers in the House, and that it is not judicially reviewable.

Senator HEFLIN. You, in regard to the DeConcini-Nunn bill, or the Judicial Conduct and Disability Act, have taken a pretty strong position. Now, if you are confirmed and sitting on the Supreme Court, what standard would you use in determining whether or not to recuse yourself from cases that would come before you as a judge on the Supreme Court if the issue of its constitutionality were to be raised?

Do you feel like there are certain standards that you would use or follow on the issue of recusals pertaining to this issue and any other issue in which you have firmly stated a position, in effect, in a nonjudicial capacity.

Judge KENNEDY. As you know, Senator, there are two methods of recusal. One is automatic recusal. Automatic recusal is required under the statute whenever a judge has a financial interest, even the ownership of one share of stock in a corporation that is a party to a given case.

So the first thing you do is you look at the statute—it is 18 USC Section 455—to determine whether or not recusal is required.

Then there is a more flexible standard in which the judge in his discretion must recuse himself if his impartiality can reasonably be perceived as being affected in the case.

In the instance you give, I do not think the fact that I gave one speech, even though it was a rather hard-hitting speech as I recall, would disqualify me, because I think I could keep a fair and open mind on the issue.

Senator HEFLIN. Well, following that same line of reasoning, relative to issues like privacy or abortion, if you made a statement on the issues here before this committee, in a similar manner that you may have made in a discussion before the ninth circuit court of appeals judges on the disability and the conduct matter, do you feel like that that would in effect cause you to have to recuse yourself under the perception ground?

Judge KENNEDY. I realize that some Supreme Court nominees have taken the position before this committee that the reason they cannot answer the questions is they have to recuse.

I have some trouble with that. I think the reason for our not answering detailed questions with respect to our views on specific cases, or specific constitutional issues, is something quite different.

I think the reason is that the public expects that the judge will keep an open mind, and that he is confirmed by the Senate because of his temperament and his character, and not because he has taken particular positions on the issues.

The press is designed to keep politics and the judicial function separate. It is not because we would be compelled to recuse ourselves in cases.

Senator HEFLIN. You have made speeches pertaining to victims' rights, including a speech in March of this year to the Sixth South Pacific Judicial Conference.

And you came up with a number of suggestions in effect how to ease the problems that confront victims as they come before the court.

Would you comment on the role that victim rights have played in the decisions you have written pertaining to criminal law.

Judge KENNEDY. Yes. I cannot say at this time that I have given any specific consideration to the new provisions which involve restitution and so forth.

I misspoke. I sat on one case on whether or not restitution could be required as a condition of parole.

And I can't now recall if I authored the opinion or not. But we held that the judge was within his discretion in insisting that as a condition of parole, the offender make restitution to the victim. That is an important part of the criminal process. The whole point of awareness about the victims—is because we can expand our horizon somewhat.

Sometimes the best way to impress upon the criminal defendant, especially if he is a first time offender in a domestic violence type of case, the best way to impress on him, on the defendant, the moral wrong that he has committed, the best way to encourage him to ask for the forgiveness of the victim, is to confront him or her with the victim in the proceeding.

And that has worked in lower courts. In the State courts, they are doing this more than we are in the federal courts.

Senator HEFLIN. I remember reading somewhere, maybe in one of your speeches where you mentioned the *Bernard Goetz* case, I believe, relative to the fact that he had been mugged previously before this subway incident.

That just comes to my mind. Do you recall what you had stated on that in the past?

Judge KENNEDY. I think it was in the New Zealand speech, in which I indicated that the *Goetz* case had been a celebrated case, and simply speculated on whether or not this particular person felt abused by the system, not in anyway intending to excuse the act, but just attempting to point out that victims are a real party in interest in the crime.

They have a certain standing in the proceeding. In many cases, the ordeal the victim faces requires him or her to relive the circumstances of the crime.

It is very, very difficult. And courts can do so much just by the way of attitude, simple mechanical arrangements for the convenience and the comfort of the victim, to make it known that the law has an interest in the victim.

Senator HEFLIN. You have been on the television cameras here. There have been some feelings that the proceedings of the Supreme Court of the United States should be televised.

Some of the State courts have televised their proceedings. Some make a distinction between appellate courts and trial courts.

Do you have any initial reaction about TV in the courts?

Judge KENNEDY. My initial reaction is that I think it might make me and my colleagues behave differently than we would otherwise.

Perhaps we would become accustomed to it after awhile. The press is a part of our environment. We cannot really excise it from the environment.

But in the courtroom, I think that the tradition has been that we not have that outside distraction, and I am inclined to say that I would not want them in appellate court chambers.

I once had a case—it was a very celebrated case—in the City of Seattle. The courtroom was packed. We were at a critical point in the argument. I was presiding.

A person came in with all kinds of equipment and began setting it up. He disturbed me. He disturbed the attorneys. He disturbed everybody in the room.

He was setting up an easel to paint our picture, which was permitted. If he had a little Minox camera, we would have held him in contempt.

So the standard doesn't always work.

Senator HEFLIN. Well, there are certain courts that have given a lot of study to this issue. And they impose certain restrictions such as certain locations, certain places, no flash bulbs, etc.

My observation has been that it can be done without interfering with the court.

It does cause a few of the justices to wear blue shirts and red ties and dark suits. But that is not uncommon among judges anyway.

I think there is one other question that I think should be asked with Senator Kennedy here. You are not kin to Ted Kennedy in any way are you?

Judge KENNEDY. Well, my father once announced that we probably were. And my mother came back the next evening and said, you know, we are related. And she began to smile, and she said, on the Fitzgerald side. So [Laugher.]

So I'm not sure.

The CHAIRMAN. You would both be lucky if you were.

The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Kennedy, when my first round expired, I was asking you about the comment in your speech concerning the distinction between essential rights for a just system, or essential rights in our constitutional system.

And I am going to try to boil this question down, because I have quite a few questions to ask, and there is not a great deal of time remaining. And I know that Chairman Biden wants to finish up this evening.

The CHAIRMAN. Take as much time as you want. No Senator will be cut off.

Senator SPECTER. Well, in that event, I will take it slow and easy.

The CHAIRMAN. Seriously. We are going to stay with the rounds. Just like we did in every hearing I have ever conducted.

That is, you have your half an hour. And if you have more questions, we will go to the next round, and narrow it down until there are only one or two left.

You can ask questions until you exhaust questions. And I have never known you or anyone else in this committee to go on and ask questions that were not warranted.

So take all the time you need.

Senator SPECTER. Well, thank you, Mr. Chairman.

I think the questions are warranted, and there are a number of important areas I think yet to be covered.

You have written criticizing legal realism. You make specific reference, in one of your speeches, to three very important decisions, characterizing *Baker* v. *Carr* as being a matter where a revolution was wrought, and *Brown* v. *Board* and *Gideon* v. *Wainwright*.

And in response to questions here today, you have stated your agreement with the *Mapp* v. *Ohio* search and seizure case and *Escobedo* and *Miranda* on warnings.

And my question is, do you agree generally with the decisions of the Warren court, which have been characterized in many quarters as being a product of legal realism?

Judge KENNEDY. Well, there are two different questions at least, implicit in your statement.

One is this question of legal realism altogether. And the second is the decisions of the Warren Court.

I have indicated that I thought the decisions of the Warren Court went to the very verge of the law at least. We are talking about criminal procedure cases, the ones we have mentioned. That we have paid a heavy cost for imposing those rules on the criminal system; that they seem to be part of our constitutional system now; and that I think a very strong argument would have to be mounted in order to withdraw those decisions.

I do think the decisions have evinced on an explicit basis, the fact that they involve pragmatic, preventative rules announced by the Court, and the Court itself has admitted that they are not necessarily demanded by the Constitution.

Now, so far as legal realism is concerned, that is a philosophy which I think has a substantial grip on much of the profession, on much of the bench. And it is probably a description of how we feel and how we behave.

But I think it has very little part in constitutional interpretation. Legal realism is really an offspring of the school of historicism, which is the idea that no principle, no institution, no charter, no rule, survives its own generation, its own time; that everything is up for grabs every generation.

I think that is just completely inconsistent with the idea of a Constitution. I think it just has no place in constitutional law.

Now, it is true that in the lower courts this may be a description of our process. Because we look at economics, and we look at sociology, et cetera, in order to make our judgments. But in those areas, the Senate of the United States and the Congress can correct us if we are wrong.

Senator SPECTER. But as a generalization, you do believe, and I think you answered this in the prior question, that the American courts have not departed from their mandate, and that as the continuum or tradition of American constitutional law has evolved, the only case you picked out that you disagreed with was *Dred Scott*.

So that as a generalization, the established precedents are satisfactory.

Judge KENNEDY. Well, I have been rather cautious about going through a list of cases that I agree with and disagree with. Because

I think that the position of a Supreme Court Justice has to be that precedents can be reexamined and we cannot commit to the Senate Judiciary Committee otherwise.

Senator SPECTER. Let me turn now to the *Chadha* decision, Judge Kennedy. And to the statement which I had referred to in my opening, which was somewhat critical of the Congress.

And that was your statement at the end of the speech, which you made at the Stanford law faculty back in 1984, where you said, the ultimate question then is whether the *Chadha* decision will be the catalyst for some basic Congressional changes.

My view of this is not a sanguine one. I am not sure what it will take for Congress to confront its own lack of self-discipline, its own lack of party discipline, its own lack of a principled course of action besides the ethic of ensuring its reelection.

Those are fairly strong statements. And I do not bring them up to disagree, necessarily, but to ask you if that view of the legislative process, and that view of the Congress, played any part, however minor, in your decision in *Chadha*.

Judge KENNEDY. I think the answer is no. That statement is rapidly rising to the top of the list of things I wish I hadn't put in my speech notes.

It was designed to trigger a discussion with the Stanford law faculty, which I am not sure we ever got to, about whether or not the Congress of the United States is in a position, under the Constitution, to make essential and important changes in its operations so that it can police and supervise the regulatory agencies that we said it could not in *Chadha*.

Certainly I did not in the speech or in the speech notes mean to indicate any disrespect for the Congress or the legislative process. It is really the heart of our democracy.

And I have said here repeatedly that in my view, it is the Congress of the United States that must take the lead in ensuring the fact and the reality that we have the basic conditions necessary for the enjoyment of the Constitution.

Senator SPECTER. Judge Kennedy, you have testified about your firm conviction on the propriety of *Marbury* v. *Madison* and of judicial review.

Judge KENNEDY. Yes.

Senator SPECTER. There was a comment in a speech you made before the Los Angeles Patent Lawyers Association back in February of 1982, which I would like to call to your attention and ask you about.

Quote: As I have pointed out, the Constitution, in some of its most critical aspects, is what the political branches of the government have made it, whether the judiciary approves or not.

By making that statement, you didn't intend to undercut, to any extent at all, your conviction that the Supreme Court of the United States has the final word on the interpretation of the Constitution?

Judge KENNEDY. That is my conviction. And I think that the Court has an important role to play in umpiring disputes between the political branches.

Senator SPECTER. What did you mean by that, that in most critical aspects, it is what the political branches of the government have made it, whether the judiciary approves or not?

Judge KENNEDY. I was thinking in two different areas. One in this area of separation of powers and the growth of the office of the presidency. The courts just have had nothing to do with that.

Second, and even more importantly, is the shape of federalism. It seems to me that the independence of the States, or their non-independence, as the case may be, is really largely now committed to the Congress of the United States, in the enactment of its grants-in-aid programs, and in the determination whether or not to impose conditions that the States must comply with in order to receive federal monies; that kind of thing.

Senator SPECTER. Well, this is a very important subject. And I want to refer you to a comment which was made by Attorney General Meese in a speech last year at Tulane, and ask for your reaction to it.

He said this: But as constitutional historian Charles Warren once noted, what is most important to remember is that, quote, however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law, not the decisions of the Court.

By this, of course, Charles Warren did not mean that a constitutional decision by the Supreme Court lacks the character of law. Obviously it does have binding quality. It binds the parties in a case, and also the executive branch for whatever enforcement is necessary.

But such a decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and evermore.

Do you agree with that?

Judge KENNEDY. Well, I am not sure—I am not sure I read that entire speech. But if we can just take it as a question, whether or not I agree that the decisions of the Supreme Court are or are not the law of the land. They are the law of the land, and they must be obeyed.

I am somewhat reluctant to say that in all circumstances each legislator is immediately bound by the full consequences of a Supreme Court decree.

Senator SPECTER. Why not?

Judge KENNEDY. Well, as I have indicated before, the Constitution doesn't work very well if there is not a high degree of voluntary compliance, and, in the school desegregation cases, I think, it was not permissible for any school board to refuse to implement *Brown* v. *Board of Education* immediately.

On the other hand, without specifying what the situations are, I can think of instances, or I can accept the proposition that a chief executive or a Congress might not accept as doctrine the law of the Supreme Court.

Senator SPECTER. Well, how can that be if the Supreme Court is to have the final word?

Judge KENNEDY. Well, suppose that the Supreme Court of the United States tomorrow morning in a sudden, unexpected development were to overrule in *New York Times* v. *Sullivan*. Newspapers no longer have protection under the libel laws. Could you, as a legislator, say I think that decision is constitutionally wrong and I

want to have legislation to change it? I think you could. And I think you should.

Senator SPECTER. Well, there could be legislation——

Judge KENNEDY. And I think you could make that judgment as a constitutional matter.

Senator SPECTER. Well, there could be legislation in the hypothetical you suggest which would give the newspapers immunity for certain categories of writings.

Judge KENNEDY. But I think you could stand up on the floor of the U.S. Senate and say I am introducing this legislation because in my view the Supreme Court of the United States is 180 degrees wrong under the Constitution. And I think you would be fulfilling your duty if you said that.

Senator SPECTER. Well, you can always say it, but the issue is whether or not I would comply with it.

Judge KENNEDY. Well, I am just indicating that it doesn't seem to me that just because the Supreme Court has said it legislators cannot attempt to affect its decision in legitimate ways.

Senator SPECTER. Well, but the critical aspect about the final word that the Supreme Court has is that there is a significant school of thought in this country that the Supreme Court does not have the final word. That the President has the authority to interpret the Constitution as the President chooses and the Congress has the authority to interpret the Constitution as the Congress chooses, and there is separate but equal and the Supreme Court does not have the final word.

And, if *Marbury* v. *Madison* is to have any substance, then it seems to me that we do have to recognize the Supreme Court as the final arbiter of the Constitution, just as rockbed.

Judge KENNEDY. Well, as I have indicated earlier in my testimony, I think it was a landmark in constitutional responsibility for the Presidents in the *Youngstown* case and the *Nixon* case to instantly comply with the Courts decisions. I think that was an exercise of the constitutional obligation on their part. I have no problem with that at all.

Senator SPECTER. Well, there has been compliance because it has been accepted that the Supreme Court is the final arbiter. I just want to be sure that you agree with that proposition.

Judge KENNEDY. Yes, but there just may be instances in which I think it is consistent with constitutional morality to challenge those views. And I am not saying to avoid those views or to refuse to obey a mandate.

Senator SPECTER. Well, I think it is fine to challenge them. You can challenge them by constitutional amendment, you can challenge by taking another case to the Supreme Court. But, as long as the Court has said what the Court concludes the Constitution means, then I think it is critical that there be an acceptance that that is the final word.

Judge KENNEDY. I would agree with that as a general proposition. I am not sure there are not exceptions.

Senator SPECTER. But you can't think of any at the moment?

Judge KENNEDY. Not at the moment.

Senator SPECTER. Okay. If you do think of any between now and the time we vote, would you let me know?

Judge KENNEDY. I will let you know, Senator.

Senator SPECTER. Let me pick up some specific issues on executive power and refer to a speech that you presented in Salzburg, Austria, back in November of 1980, where you talk about the extensive discretion saying, "The blunt fact is that American Presidents have in the past had a significant degree of discretion in defining their constitutional powers."

Then you refer to, "The President in the international sphere can commit us to a course of conduct that is all but irrevocable despite the authority of Congress to issue corrective instructions in appropriate cases." Then you refer to President Truman, saying he committed thousands of troops to Korea without a congressional declaration. And then you say, "My position has always been that as to some fundamental constitutional questions it is best not to insist on definitive answers."

And you say further, "I am not one who believes that all of the important constitutional declarations of most important constitutional evolutions come from pronouncements of the courts."

And, without asking you for a specific statement on the War Powers Act, that is a matter of enormous concern that engulfs us with frequency. Major questions arise under the authority of the Congress to require notice from the President on covert operations coming out of the Iran-contra hearings. What is the appropriate range of redress for the Congress? Do we cut off funding for military action in the Persian Gulf? Do we cut off funding for covert operations? Are these justiciable issues which we can expect the Supreme Court of the United States to decide?

Judge KENNEDY. Well, whether or not they are justiciable issues, of course, depends on the peculiar facts of the case, and I would not like to commit myself on that. But the very examples you gave indicate to me that there are within the political powers of the Congress, within its great arsenal of powers under article I of the Constitution, very strong remedies that it can take to bring a chief executive into compliance with its will, and this is the way the political system was designed to work.

The framers knew about fighting for turf. I don't think they knew that term, but they deliberately set up a system wherein each branch would compete somewhat with the other in an orderly constitutional fashion for control over key policy areas. And these are the kinds of things where the political branches of the government may have a judgment that is much better than that of the courts.

Senator SPECTER. But isn't it unrealistic, Judge Kennedy, to expect the Congress to respond by cutting off funds for U.S. forces in the Persian Gulf? If you accept the proposition that the President can act to involve us in war without a formal declaration, and the President and the Congress ought to decide those questions for themselves, isn't that pretty much an abdication of the Supreme Court's responsibility to be the arbiter and the interpreter of the Constitution?

Judge KENNEDY. Well, I don't know if it is an abdication of responsibility for a nominee not to say that under all circumstances he thinks the Court can decide that broad of an issue. If the issue is presented in a manageable judicial form, in a manageable form,

I have no objection to the Court being the umpire between the branches.

On the other hand, I point out that having to rely on the courts may infer, or may imply an institutional weakness on the part of the Congress that is ultimately debilitating. It seems to me that in some instances Congress is better off standing on its own feet and making its position known, and then its strength in the federal system will be greater than if it had relied on the assistance of the courts.

Senator SPECTER. Well, you testified earlier that you could say standing enhanced by legislative enactment.

Judge KENNEDY. Yes.

Senator SPECTER. And some of the legislation is now pending to give broader standing as was given in *Buckley* v. *Valeo*, so that you would—obviously, you have to reserve judgment, but you could see an appropriate role for a judicial decision on these tough constitutional questions, notwithstanding the generalizations that I just read to you?

Judge KENNEDY. I think so. Dean Choper, of the University of California at Berkeley, has a book in which he proposes the idea that the Court should always withdraw from any dispute between the branches. He would, I think, say *Youngstown* is wrong, that the *Nixon* tapes case is wrong, and I disagree with that. I think there is a role for the Court.

Senator SPECTER. Well, I think that is an important proposition, and I think it may well be before you, and I obviously don't ask for any commitments or any statements on it except to hear what one Senator has to say about it and what is the prevailing view in the Senate, that at some point we feel the War Powers Act has to be tested. That it has been a very important response to the fact of life that the United States is involved in wars without declarations, that the constitutional authority of the Congress has eroded there, the impracticality of cutting off funds once there is a military action. You note the commitment of troops in Korea. There has been many others.

And I was just a little concerned about your statements that the executive defines its own authority and your statements about the courts keeping hands off. And I am assured, as you have testified today, that there may be an appropriate role for the Supreme Court of the United States, depending on the specific factual presentation.

Judge KENNEDY. Yes. And, as I think we would both agree, much of what I was saying there was a recitation of simple facts. The Presidency has grown to have power of tremendous proportions.

Senator SPECTER. Judge Kennedy, I would like now to refer to a number of cases where I have certain concerns where you have reached conclusions as a matter of law which seem to me to undercut the fact-finding process. These are cases which you and I discussed when we talked informally in my office sometime ago.

The case of the *City of Pasadena School Board*, quite a controversial matter, was decided in an opinion which you wrote, or you wrote a concurring opinion after a district court judge had sought to retain jurisdiction. And the memorandum opinion of the district court judge sets forth an extensive sequence of factual findings ex-

pressing a concern about the conduct of the Board, election promises, which the district judge, the finder of fact, concluded required the district court to retain jurisdiction.

And, without going through them at great length, there boil down in footnote 19 where the district court judge found "a majority of the defendants [those on the school board] have acted with unyielding zeal and overt antipathy to the desegregative concept of the Pasadena Plan. Promising return to neighborhood schools with a recognition that it cannot be accomplished without resegregation of Pasadena schools is bad faith not only to the principles of constitutional duty but also to their own constituency."

One comment that you made in your opinion that I have a question about, one I read to you when we met privately about 10 or 12 days ago, where you said at 611 Fed. 2nd at 1247, "Where the Court retains jurisdiction a board may feel obliged to take racial factors into account in each of its decisions so that it can justify its actions to the supervising court. This may make it more, rather than less, difficult to determine whether race impermissibly influences board decisions. Where the subject is injected artificially into the decision process and the weight that racial considerations might otherwise have had is more difficult to determine."

And my question to you before, and I repeat now, what is wrong with that, especially in the context of the very strong findings of fact by the lower court judge of bad faith by the school board?

Judge KENNEDY. This case had a long history. It went to the Supreme Court on more than one occasion. It was in our court on I guess four different occasions. And this particular aspect of it presented one of the most troubling areas of desegregation laws, and that is when does a court's supervision cease?

In this case the City of Pasadena had, in compliance with a court decree, been implementing a plan that was certified ultimately by the Supreme Court to be a plan for a unitary district, which is the parlance for saying a district that complies in all respects with a desegregation decree.

The findings of the Supreme Court of the United States and of our court—and uncontradicted by the district court—were that the district had met full compliance for a period of more than 2 years. Now the question was how long does the district court's supervision last? This was a case in which the district court judge at one time, in response to that question from an attorney, had said that district court supervision will last as long as I live.

Now, at some point school districts must assume responsibilities for their own affairs. At some point the jurisdiction of the court must cease. At some point we must allow the school districts to again resume charge of their affairs. And, if there is a further violation of the Constitution of the United States, an action can then again be implemented.

We concluded that because there had been full compliance, because a unitary district had been achieved, the court was acting improperly in looking at election campaign promises and election rhetoric in order to justify its continued decrees.

What happened here was there were some schools—I forget if they called them magnet schools or neighborhood schools—that had been proposed in a district in which unitary compliance had

been achieved, and we simply ruled that the district had to again stand on its own feet, and that if there was a violation there could again be a suit.

It is a very difficult area of the law to determine how to withdraw. The very fact that the court is involved affects the equation.

Senator SPECTER. How much were you influenced by the judge's statement that he would keep jurisdiction as long as he would live? Did you consider having the judge replaced in the case, if that statement really amounted to a declaration of a bias or prejudice?

Judge KENNEDY. Well, it didn't amount to a declaration of bias and prejudice but it indicated the difficulties that the district court had in extricating itself from the decree of the court. And we felt that the school district having been in good faith full compliance for a period of years was entitled to a release of the jurisdiction of the court.

Senator SPECTER. Well, but that is the question. The question is whether the school board was in compliance. You note in your opinion, "The district court found that the board has acted and failed to act with the same segregative intent that this court found in 1970," and the memorandum opinion of the board is replete with facts and, of course, we know that the lower court is in a better position to find the facts, especially questions of intent. And it was a little hard for me to follow the conclusion as a matter of law that the lower court was wrong in the face of those very extensive factual findings.

Judge KENNEDY. Well, we looked at the findings and concluded otherwise I think, Senator. I agree with you that the fact-finding functions of a district court cannot be usurped by an appellate body. On the other hand, they have to fit the ultimate remedy the court gave, and in this event we thought that the Pasadena School District should be restored to its own status.

Senator SPECTER. Well, the other two cases that I want to talk to you about, and there are many more but I have limited it to three cases, are the *AFSCME* v. *State of Washington* case——

Judge KENNEDY. Yes.

Senator SPECTER [continuing]. And here again there were very strong factual findings by the lower court. The district court said at page 863 of 578 Fed. supp., "Evidence which when considered as a whole shows discriminatory intent includes the historical contacts out of which the challenge to failure to pay arose," and later in the district court's opinion the comment is made, "There is little doubt that the State produced evidence that the unlawful discrimination was other than in bad faith the *Manard* and *Norse* decisions would have persuaded this court that back pay would not have been in an appropriate remedy."

Then going on to say, "Rather the persistent and intransigent conduct of defendant in refusing to pay plaintiffs indicates bad faith."

This is a very complicated case and there is a great deal involved and you commented on it to some extent, and I don't cite it really to—well, I cite it on the substantive law, but really more particularly—and my time is up, and let me just finish it and then give you a chance to respond.

One of your concluding statements, as it appears on 77 Fed. 2nd at 1408, "Absent the showing of discriminatory motive, which has not been made here, the law does not permit the Federal courts to interfere in a market-based system for the compensation of Washington's employees."

And, in this one, like the *City of Pasadena* case, I question in terms of your coming to a conclusion as a matter of law which overturns very strong findings of fact by a lower court in the civil rights area.

Judge KENNEDY. I suppose I would disagree with your conclusion about very strong findings, in that I don't think the findings at all related to the remedy. I don't think the findings at all related to the violation that the district court findings were—the part you quoted was simply conclusory. The actual findings were that the State of Washington had done a comparable worth study. The actual findings were that the State of Washington had advertised in some cases for male-only jobs and that it had ceased that. And we simply found that as a matter of law this was wholly insufficient to say that Washington was violating the law by not adopting a comparable worth scheme for every one of its female employees.

So I would think that those are fact findings simply are not related to the judge's conclusion, and so I would disagree with the characterization as strong.

Senator SPECTER. Thank you very much, Judge Kennedy. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Byrd.

Senator BYRD. Judge Kennedy, I am sure you feel you have had a very fair hearing here, and that the questions have been tempered and incisive, to the point; am I correct?

Judge KENNEDY. You are certainly correct, Senator.

Senator BYRD. I am pleased to have had an opportunity to meet with you privately. I am sure that everybody else on here probably have done the same thing. But based on my own private conversations with you, and you didn't promise me anything or commit to anything in those conversations, and I didn't ask you to, and based on what I have read and heard and my observations of the hearing, I don't believe you are in any trouble.

I am inclined to vote for you, barring some unforeseen happening. I am a conservative when it comes to the courts. Probably a liberal on some matters and moderate in others. I hope I am not an extremist in anything.

Disraeli said that he was a conservative to conserve all that was good in his constitution and that the radicals would do all that was bad. I believe in the death penalty. I believe it is constitutional. The Constitution refers to capital crimes.

What are your comments, or would you have any on the subject?

Judge KENNEDY. Well, with reference to the death penalty, Senator, I have taken the position with your colleagues on the committee that the constitutionality of the death penalty has not come to my attention as an appellate judge and that I will not take a position on it, but that if it is found constitutional I think it should be efficiently enforced.

Senator BYRD. We had a little difficulty with another nominee for this position recently in connection with congressional standing, and I was left to believe that the Congress would not be allowed in the Court in the event there were disputes between the legislative branch and the executive on that occasion.

Perhaps others have asked questions on this subject, but would you care to indicate whether or not you feel that there is—do you have any problem with Congress being able to get standing to receive justice in the Court if you become a member of the Supreme Court and there is a serious question that arises between the executive branch and the legislative and the country's national security interests, let's say, are involved?

Judge KENNEDY. In a colloquy that we had earlier this afternoon, Senator——

Senator BYRD. No, I did not hear the colloquy.

Judge KENNEDY. Right. I mean one that I had before you came in. I made it clear that in my view it is quite appropriate for the Court to act as an umpire between the political branches of the government. The circumstances in which a case that meets the case or controversy doctrine are ones that we would have to examine in a particular case. I think that in the *Youngstown* case, the steel seizure case, and the *Nixon* tapes case, the Court acted completely appropriately in defining and determining the bounds of power between the two political branches. I think that is a completely appropriate role for the Court to play.

Senator BYRD. Why would you want to be a Supreme Court Justice? Has anybody asked you that question yet?

Judge KENNEDY. I think Senator Leahy asked me that question.

Senator BYRD. Well, then you don't need to answer it for me.

Judge KENNEDY. Well, I would be pleased to tell you, Senator, that I am committed to constitutional rule and I think every person in this Senate is, and I think every American is; and I want to do the best I can to honor that commitment.

Senator BYRD. I suppose you have been queried as to your position on judicial restraint, how you view the responsibilities and role of the Supreme Court under the Constitution.

Judge KENNEDY. I have, Senator, and I believe the role of the Supreme Court must be to maintain its independence but at all times to obey the Constitution and the law.

Senator BYRD. And I suppose you would view the Court not as a traveling constitutional convention?

Judge KENNEDY. Absolutely.

Senator BYRD. Or as an erstwhile legislative branch?

Judge KENNEDY. Not at all, Senator. I would not so view it.

Senator BYRD. Well, what is the role of the Supreme Court? Is it merely that of interpreting the law and the Constitution and applying the law and the Constitution to the facts of the case, or is it that of blazing new trails and, in essence, changing the laws, enacting the laws, enacting new laws?

I am sure you have probably been asked these questions already, and I apologize to you. You need not elaborate at great length on my questions if others have asked them because I will be reading the hearing.

Judge KENNEDY. Senator, the Court can use history in order to make the meaning of the Constitution more clear. As the Court has the advantage of a perspective of 200 years, the Constitution becomes clearer to it, not more murky. The Court is in a superior advantage to the position held by Mr. Chief Justice Marshall when he was beginning to stake out the meanings of the Constitution in the great decisions that he wrote.

And this doesn't mean the Constitution changes. It just means that we have a better perspective of it. This is no disparagement of the Constitution. It is no disparagement of the idea that the intentions and the purposes of the framers should prevail. To say that new generations yield new insights and new perspectives does not mean the Constitution changes. It just means that our understanding of it changes.

The idea that the framers of the Constitution made a covenant with the future is what our people respect and that is why they follow the judgments of the Supreme Court, because they perceive that we are implementing the understanding of the framers. I am committed to that principle.

Senator BYRD. How do you view previous decisions, precedent, the doctrine of *stare decisis*? Do you feel that precedent should be given a great deal of weight? Is precedent supreme, or is precedent to be given a strong place but in the light of changing circumstances, perhaps? That you would not have any great difficulty in overriding precedent?

Judge KENNEDY. As you know, Senator, *stare decisis* has an element of certainty to it, which most Latin phrases do, but it really is a description of the entire legal process. *Stare decisis* is the guarantee of impartiality. It is the basis upon which the case system proceeds, and without it we are simply going from day to day with no stability, with no contact with our past.

And so *stare decisis* is very important, but, obviously, if a case is illogical, if it cannot be reconciled with all of the parallel precedent, if it appears that it is simply out of accord with the purposes of the Constitution, then it must be overruled.

Senator BYRD. Well, I congratulate you again, and I think that in due time the Senate will consider your nomination. I can assure you that your nomination will be given a very fair and thorough hearing in the course of Senate debate based on your testimony thus far and your conduct in these hearings and my perception based on what I have read and heard and seen and what I have listened to among my colleagues, I have a feeling that you are going to have the opportunity to don those robes and sit on that Court. And if the good Lord does his will and nothing happens to keep you from doing that, I certainly want to extend the hope that you will be there a long time. I have a favorable impression from the standpoint of my own measurements, my own standards, as one who believes that the legislative branch under this system was created to do the legislating and that the branches are equal, coordinate. I believe strongly in our system of checks and balances, and I believe the Court has the role of interpreting the laws and the Constitution. I think the judges should exercise restraint and not allow themselves to get over into the realm of the legislative branch.

And having said that, I will exercise a little restraint, Mr. Chairman, and say no more, except thank you for the hearing. I would like to thank my colleagues for the dedication that they always pursue in hearing the nominees, the questions that they ask, the preparations that they make in advance of the hearings. And again, to compliment you and wish you and your family a happy holiday season.

Judge KENNEDY. Thank you for those gracious remarks, Mr. Chairman, and for the courtesy that all of your colleagues have shown me. The advise and consent process is a very meaningful one to me.

The CHAIRMAN. Thank you, Senator.

The Senator from New Hampshire.

Senator HUMPHREY. Back to judicial restraint, Judge, if you don't mind.

Judge KENNEDY. Not at all, Senator.

Senator HUMPHREY. The advise and consent role is very important. We exercise it only once with each nominee.

I am not fully satisfied that I have your views in this area perfectly in focus. Just how seriously do you view the absence of judicial restraint, which I will call judicial activism? How seriously do you view that as misconduct by judges?

If you were a Senator, would you reject, refuse to confirm a candidate to the bench who rejected the philosophy and the doctrine of judicial restraint?

Judge KENNEDY. Well, it is not clear to me that a Senator can always reject a nominee because of some disagreement with philosophy. But, if you have a nominee who tells you that he or she is not bound by the law of the Constitution, that he or she is superior to precedent, that he or she has some superior insights into the great principles that made this country devoted to constitutional rule, then I think you could very easily reject that nominee.

Senator HUMPHREY. Yes, that would be easy but it doesn't present itself that way, as you know.

Judge KENNEDY. I think there may be a problem in that I am not sure that, in the last 20 years, any nominee has not embraced the doctrine of judicial restraint because that is a phrase that is rather simple to adopt, and the question is whether or not it is given meaning and given application in the deliberative approach that the judge brings to his or her work. I can point to my record—12 years of opinions in which I think I indicate that careful approach.

Senator HUMPHREY. Earlier you mentioned facts which judges might consider in determining what activities are covered by the privacy right. You mentioned things such as the essentiality of the right to human dignity, the inability of a person to manifest his or her own personality, the inability of the person to obtain his or her own self-fulfillment.

It seems to me that such broad subjective concepts are an invitation, or can certainly lead to the exercise of political power, raw political power that you spoke of disparagingly in your Stanford speech.

Judge KENNEDY. They are unless they are used with the view to determining what the Constitution means. The framers had—by that I mean those who ratified the Constitution—a very important

idea when they used the word "person" and when they used the word "liberty." And these words have content in the history of Western thought and in the history of our law and in the history of the Constitution, and I think judges can give that content. They cannot simply follow their own subjective views as to what is fair or what is right or what is dignified. They can do that so that they can understand what the Constitution has always meant.

Senator HUMPHREY. I remain uneasy about what you said regarding the ninth amendment. You said, it seems to me, the Court is treating it as something of a reserve clause to be held in the event the phrase "liberty" and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision.

I don't know why you choose to be so vague, and in my mind so—leave things in such a worrisome suspension, when the Court has never used the ninth amendment to invent new rights. Indeed one of the most liberal of the liberals, William O. Douglas, said in his concurring opinion in *Dole* that the ninth amendment obviously does not create federally enforceable rights, and against that finding by Justice Douglas, against the history of the Court, against the clear—there are few amendments that have a clearer historical context, where the intent is clearer, than the ninth amendment.

And now the thing has been reversed—if we apply the doctrine of incorporation illogically to it, and you seem to hold open that possibility, the thing is reversed in its intent——

Judge KENNEDY. Yes.

Senator HUMPHREY [continuing]. Intended application, and now you are saying that the Court is holding it in reserve. In case it can't find something else in the Constitution, why it always has this to fall back on.

Judge KENNEDY. Well, to begin with, don't shoot the messenger. I am describing the jurisprudence of the Court as I think it exists. The Court has simply not had the occasion to reach the ninth amendment for the resolution of its cases, and it seems to me inappropriate for me to announce in advance what its meaning is. I have indicated what I think, what I understand its original purpose to be, which was actually a disclaimer that the Constitution of the United States was intended to constrain the States in any respect in the adoption of their Bills of Rights.

Senator HUMPHREY. Well, do you find a—do you consider the intent of the ninth amendment to be pretty clear?

Judge KENNEDY. No.

Senator HUMPHREY. Even given the historical——

Judge KENNEDY. Well, the purpose of it is as I believe I have described it.

Senator HUMPHREY. Well, what is the difference between the purpose and the intent?

Judge KENNEDY. Its meaning is somewhat unclear. The reason for Madison's using it as a device is not completely clear. I think the explanation I gave is the best one, but that is not completely clear.

Senator HUMPHREY. Well, his words are pretty clear on the point, if I just knew where to find them. I am getting paper fatigue at this point. You have got fatigue yourself I am sure. Here it is.

He said that "It has been objected also against the Bill of Rights that by enumerating particular exceptions to the grant of power it would disparage those rights which were not placed in that enumeration, and it might follow by implication that those rights which were not singled out were intended to be assigned into the hands of the general government and were consequently insecure."

And so this was a clarification on the part of the Federalists that even though certain rights were enumerated that didn't mean that everything else was denied to the States.

Judge KENNEDY. I think that that is the most plausible interpretation of the amendment.

Senator HUMPHREY. Jumps right out at you. Couldn't be clearer.

And then I am concerned likewise by your vagueness, unwillingness to recognize 200 years or so of validation of capital punishment. The Court has never, even in *Furman* the Court has never suggested that capital punishment is unconstitutional per se, fundamentally. Why are you not willing to—why are you so vague on a point that is so well settled?

Judge KENNEDY. Well, I guess we have a disagreement as to whether or not it is well settled, Senator. These decisions are very close. Some Justices have indicated that it is unconstitutional, and I simply think that I should not take a specific position on a constitutional debate of ongoing dimension.

I have indicated that in my view if held constitutional it should be swiftly and efficiently enforced. I recognize also that capital punishment is recognized in the Constitution, in the fifth amendment.

Senator HUMPHREY. I am sorry. I couldn't hear that last sentence.

Judge KENNEDY. Capital punishment is recognized in the Constitution.

Senator HUMPHREY. And you said something else that I didn't hear.

Judge KENNEDY. In the fifth amendment.

Senator HUMPHREY. Yes.

In your Stanford speech you point out that in the post-*Griswold* privacy cases the debate shifts to the word "privacy" rather than to the constitutional—to a constitutional term such as "liberty."

What is the significance in that statement? What are you trying to say?

Judge KENNEDY. Well, I was trying to indicate that simply because we find a new word we don't avoid a whole lot of very difficult problems. It is not clear to me that substituting the word "privacy" is much of an advance over interpreting the word "liberty," which is already in the Constitution.

And I indicated that, to illustrate that, that the Convention on Human Rights, which contains the word "private," produced a case which had many of the same issues in it that we would have to confront, and so that the word "privacy" should not be something that convinces us that we have much certainty in this area.

Senator HUMPHREY. Are you saying that these privacy cases would be better dealt with under the liberty clause?

Judge KENNEDY. That is why I have indicated that I think liberty does protect the value of privacy in some instances.

Senator HUMPHREY. You would prefer then to deal with privacy cases under the liberty clause?

Judge KENNEDY. Yes.

Senator HUMPHREY. As opposed to dealing with them under emanations of penumbrae?

Judge KENNEDY. Yes, sir.

Senator HUMPHREY. Ever seen an emanation? That is a real term of art, isn't it? I am not a lawyer. Had that ever been used before?

Judge KENNEDY. Certainly not in a constitutional case.

Senator HUMPHREY. That is really a, that one is really a shameless case of——

The CHAIRMAN. Senator, excuse me.

Senator HUMPHREY. Yes?

The CHAIRMAN. The Senator from West Virginia would like to ask you a question.

Senator BYRD. Did you say emanation? To emanate? What is the word you are referring to?

Judge KENNEDY. Emanations.

Senator BYRD. Emanations?

Judge KENNEDY. Emanations, yes. "Penumbras and emanations" was the phrase used in the *Griswold* case.

Senator BYRD. Thank you. That word is not in the Constitution, though, is it?

Judge KENNEDY. Not at all. And I have indicated it is not even in any previous—the Senator indicated it was not even in any previous cases.

Senator BYRD. But the word "liberty" is in the Constitution?

Judge KENNEDY. Yes, sir.

Senator BYRD. I like that word "liberty" in the Constitution.

Senator HUMPHREY. Do you think there are a whole lot more emanations from this penumbra?

Judge KENNEDY. I don't find the phrase very helpful.

Senator HUMPHREY. Good. Well, two hopes. Hope number one is that you will at least once a year read your Stanford speech. Hope number two is that you will not intrude on our turf. Thank you.

Judge KENNEDY. Thank you, Senator. I will certainly commit to the former, and I will try to comply with the latter.

The CHAIRMAN. Judge, have you had a chance to read "The Forgotten Ninth Amendment" by Bennett P. Patterson?

Judge KENNEDY. I think I glanced at it some years ago, Senator.

The CHAIRMAN. Well, while we are hoping, I hope you read it again.

Judge KENNEDY. All right.

The CHAIRMAN. We will have an opportunity, the Senator and I, as long as we are here to debate the meaning of the ninth amendment, but in here he liberally quoted from Madison's utterances at the time. It may be somewhat selective, I think not. And the point one of the authors makes is, "The last thought"—referring to the ninth amendment—"The last thought in their minds was that the Constitution would ever be construed as a grant to the individual of inherent rights and liberties. Their theory"—meaning the Founding Fathers—"Their theory of the Constitution was that it was only a body of powers which were granted to the government and nothing more than that."

And it seems, if you read the ninth amendment, how anyone could avoid the conclusion that the word "retained" means "retained." Now you can argue whether it is retained by the States, or retained by individuals. That is a second argument. I won't go into that at the moment. But it seems to me that one of the—I have not found any reason, which I think in part disturbs my friend from New Hampshire, to disagree with any of the points you have made about your interpretations of the Constitution.

As I have indicated earlier, I find your reading of the Constitution, your finding of the word "liberty" in the Constitution and that it has some meaning and application, and your attitude about the fourteenth amendment in general, the fifth amendment, to be a conservative, mainstream and fundamentally different than Judge Bork's.

But having said all that, let me ask you a few questions, and hopefully this will be the end of it for me. I indicated to you earlier that staff received a telephone call from a former student and subsequently, as we do with all these calls, followed up on the call and apparently contacted four of your former students, all of whom are supporters, and strong supporters, of your nomination to the bench.

But the issue related to the question of a discussion you had in 1973 with students about the role of women in law firms at that time; that is, in the context of 1973. Could you for the record just tell us a little bit about it, without my characterizing it, because you indicated you remember it vaguely, the incident? Just tell us a little about it.

Judge KENNEDY. Both the incident and the class discussion are not very clear.

The CHAIRMAN. Quite frankly, I don't think they are very important, either.

Judge KENNEDY. But I had the habit of talking to my students in the course of a 3½-hour lecture about the problems that lawyers face in their practice, and I think it is imperative that lawyers realize that they have an obligation, first of all, to know themselves, to know their own motivations and to comply with the law strictly so that they can be a model for their clients.

And I recited to my class, as I recall, the incident of a lady who had come to our office seeking employment, and at the time we did not have a position open in any event, but I was pleased to chat with her. She was extremely well qualified. She had sent in a résumé I think and I had said that if she was in town we would be glad to talk to her. It wasn't clear to me from the résumé that she was male or female.

And when she was a female I told her that she might find some resistance in certain law firms and told her the story of a lawyer in San Francisco whom I know very well and who is a man of remarkable self-knowledge and remarkable honesty and who has a remarkable admiration for the law, who had taken the position that he would not have women in his law firm because he had a very close relation with his partners and he did not want to share that relation with another woman because of the respect he had for his wife. He behaved the way he did in front of his partners, in a way that he thought was very free, and he thought of his relations with the law partners as very intimate.

And I told her that this was an attitude that many lawyers had about their law partners. I said that in my own law firm that she would find certain problems of adjustment because of the way my partners behaved, but that I wanted to put this out in front for her, to tell her that this was the kind of thinking that some people that were sitting on the other side of an interview desk would be having, and that if I were ever to either hire or not hire her and I harbored those feelings that I wanted to make her sure that she knew that I was trying to explore, for my own satisfaction, my own motives, and my own intent.

And I told her that the world was changing. I told her also the story of when I was in the Harvard Law School and a certain professor would have "Ladies Day," and ladies were not called on unless it was "Ladies Day." And today this would not only be seen as terribly stigmatizing and patronizing but probably actionable.

And I recited this to my students to indicate that lawyers must always be honest with themselves about their motivation, honest with the people with which they deal about their motivation. And the lady, as I recall, was very appreciative of the conversation. She subsequently went to work in her own city of Los Angeles, I believe, which was where she was from. And that was all that the incident was about.

The CHAIRMAN. Have your views changed about the role of women in law firms since 1973?

Judge KENNEDY. Well, of course that wasn't my view. I was trying to indicate to her that I thought that the law was very much in flux and that it would change, and it has. Women now occupy——

The CHAIRMAN. Is it good or bad that it has changed?

Judge KENNEDY. I think it is good that it has changed.

The CHAIRMAN. Why?

Judge KENNEDY. Women can bring marvelous insight to the legal profession. Women, themselves, have been in a position where they have been subjected to both overt and subtle barriers to their advancement, and the fact that women are on the bench and on our court brings a very, very valuable insight and perspective.

We now have, I would think, close to 35 or 40 percent women in the night division of our law school class, and they are making their way into the profession and are performing admirably. And it is too bad they were not in it a hundred years ago.

The CHAIRMAN. Do you think the attitude of the profession has changed as well?

Judge KENNEDY. Absolutely. I have had female law clerks that I have worked extremely closely with and it has been a really very remarkable years when they have been with me. I have enjoyed it very much.

The CHAIRMAN. When did you hire your first female law clerk, if you know?

Judge KENNEDY. I think my second set of clerks had my first female—I guess my third set of clerks, my third year.

The CHAIRMAN. Roughly what year was that?

Judge KENNEDY. 1978.

The CHAIRMAN. You indicated, and I am paraphrasing, in response to a question from one of my colleagues, you said if someone

had been sitting here 20 years ago and had been asked to comment on the law of the first amendment as it relates to the law of libel, not even the greatest prophet could have predicted the state of the law today. It may very well be that with respect to privacy we are in the same rudimentary state of the law.

Now, Judge, there has been, obviously, we have just had some discussion about your view on the ninth amendment. As you know, Justice Goldberg, as you mentioned, in the birth control case and Justice Burger in the *Richmond Newspaper* case both treated the ninth amendment as a rule of somewhat generous construction, not just a reminder that States can protect individual rights in their own constitution, an idea that would have made the ninth amendment in my view redundant in light of the fact we had a 10th amendment that provides for just that.

In the view of Justices Goldberg and Burger the ninth amendment announces that the word "liberty" in the fifth amendment and later in the 14th amendment is broader than specifically enumerated rights contained in the Bill of Rights. The ninth amendment, in other words, in my view confirms in the text of the Constitution that spacious reading of liberty, the so-called Liberty Clause, that you have said you thought was a proper reading.

I understood you yesterday as embracing the view of Goldberg and Burger in the regard that the notion of liberty, the Liberty Clause as being one of those spacious phrases.

Former Chief Justice Burger thought that the ninth amendment shows a belief by the framers that fundamental rights exist that are not expressly enumerated in the first eight amendments, and the intent of the rights included in the first eight amendments are not exhaustive.

I would like to quote from a case. Justice Burger says:

> But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees.
>
> For example, the rights of association and of privacy, the right to be presumed innocent, the right to be judged by a standard of proof beyond reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or the Bill of Rights. Yet, this important but unarticulated rights have nonetheless been found to share Constitutional protection in common with explicit guarantees.
>
> The concerns expressed by Madison and others have been resolved. Fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

Then there is a footnote, Footnote 15. It says, "Madison's comments in the Congress also revealed a perceived need for some sort of Constitutional saving clause, which, among other things, would serve to foreclose application of the Bill of Rights of the maximum that the affirmation of particular rights implies the negation of those not expressly defined.

"Madison's efforts, culminating in the ninth amendment, serve to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others."

Now, Judge, in general terms do you share the view of Justice Burger about unenumerated rights?

Judge KENNEDY. Well, in general terms, it is not clear to me that Chief Justice Burger's position would be any different if the ninth

amendment were not in the Constitution. I think liberty can support those conclusions he reached, and the meaning, purpose, and interpretation of the ninth amendment, I think the Court has very deliberately not found it necessary to explore.

The CHAIRMAN. But I think Justice Burger used almost the same words you used yesterday that the Senator from New Hampshire would very much like for you to recant. He uses the phrase "saving clause."

Judge KENNEDY. I think I used the words "reserve clause."

The CHAIRMAN. You used the word "reserve" clause.

Judge KENNEDY. And I think the Court as a whole—I am not talking about individual Justices—has taken that view of the amendment, that they just find it unnecessary to reach that point.

The CHAIRMAN. Are they not also, with good reason, a little bit afraid of the amendment, because once you start down the road on that amendment—I find the ninth amendment clear, and I think most Justices have found it clear, in fact.

But they are reluctant to use it because once you start down the road on the ninth amendment, then it becomes very difficult to figure where to stop; what are those unenumerated rights.

Judge KENNEDY. And it is the ultimate irony that an amendment that was designed to assuage the States is being used by a federal entity to tell the States that they cannot commit certain acts.

The CHAIRMAN. Well, ironically, I think that it was, in fact, not designed, that amendment, in particular, to assuage the States as it related to the rights of the States. I think it was designed to assuage the representatives of the various States to allay their fears that any government—in this case, the only one they were dealing with at the moment, the central government—was going to, as a consequence of the first eight amendments, conclude that they were the only rights that, in fact, were retained by the people.

Judge KENNEDY. I understand that position.

The CHAIRMAN. That is a very tactful answer and you would make one heck of an ambassador. Maybe there are State Department representatives, but I do not think it is appropriate for me to push you any further on this because I, quite frankly, think you have left us all where I think it is proper to be left, quite frankly, and that is I do not think anybody here and anybody not here, including the President of the United States, and I suspect, Judge, not even you, knows how you are going to rule on some of these issues.

Quite frankly, I said at the outset when Judge Powell announced his resignation that, for me, that is just what I was looking for, as long as whomever came before us came with an open mind, did not have an ideological brief in their back pocket that they wished to enforce or move into law once they got on the Court, did not have an agenda.

The one thing that has come clear to me is that you are extremely bright, extremely well informed, extremely honorable, and open-minded. I suspect you are going to rule in ways that I am going to go, oh, my goodness, how could he have ruled that way. And I suspect you are going to rule in ways where Senator Humphrey is going to go, oh, my goodness, why did I let him get on the Court. But it seems to me that is the way it should be. We are not entitled

to guarantees. We are only entitled to know that you have an open mind.

I just realized that I had told the Senator from Pennsylvania that I would allow more questions, and here I was about to wrap up. I apologize to the Senator from Pennsylvania.

I will yield to the Senator from Pennsylvania and then to the Senator from New Hampshire if he has any further questions, and then——

Senator HUMPHREY. I have no further questions.

The CHAIRMAN. And then I will yield to the clock.

Senator SPECTER. Thank you, Mr. Chairman. I have just a few.

When the last round ended, Judge Kennedy, I was questioning certain findings you made as a matter of law in the face of certain underlying factual situations, and have referred to the Pasadena school desegregation case, and also *AFSCME* v. *Washington State* on the comparable worth case.

And the other case that I want to discuss with you, and I shall do so relatively briefly, is the *Arnada* case, which has already been the subject of some discussion.

Judge KENNEDY. Pardon me. Which case, Senator?

Senator SPECTER. The case of *Aranda* v. *Van Sickle.*

Judge KENNEDY. *Aranda* v. *Van Sickle,* yes, sir.

Senator SPECTER. And this is a voting rights case, a civil rights case, involving Mexican Americans, and I do not want to suggest, Judge Kennedy, that there are not many cases where you have been on the other side in the findings.

The case of *Flores* v. *Pierce* where you made findings in favor of Mexican Americans, and the case of *James* v. *Ball,* you made a finding for civil rights, so that there is balance and representation on both sides.

But the *Aranda* case is unique and, I think, significantly questionable, and the reason that I question it, Judge Kennedy, turns on the issue of summary judgment in a context where you say in your concurrence that it was not overwhelming.

And the law on summary judgment—and you and I had discussed this in our last session in my office—the standard for summary judgment requires that it be entered only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, and where summary judgment is considered it is particularly inappropriate where there are issues involving intention and motivation, which were present in this case, and especially in the context where the lower court had denied a request for additional discovery.

It just seems hard to understand the use of summary judgment and the refusal to allow the facts to be submitted to a factfinder in view of the very substantial constitutional issues involved here.

And the other aspect of the case, and then I will ask you to comment on it, turns on your very thoughtful opinion which comes to the conclusion that other remedies were appropriate in terms of location of polling places and employment of Mexican Americans by commissions.

And the case might have been remanded for further factfinding or it might have been remanded for an amendment on the pleadings or you might have considered, as we lawyers do, to conform

the pleadings to the proof in the case and you might have entered a remedy which was not specifically asked for.

Most complaints in equity have the prayer or other equitable relief as may appear just and appropriate under the circumstances, and I understand your statement that the plaintiff sought to change the at-large representation here. But it just seems to me that all the facts of this case really cry out for some different result than was reached in this case as a matter of basic justice.

Judge KENNEDY. Well, Senator, I have some obligation to be interesting and creative, and I am disturbed by the fact that I may sound very repetitive because I have been through this with the other Senators this morning and again earlier this afternoon.

The parties and the attorneys have the right to determine the shape and the contours of their lawsuit. The repeated questioning in the court indicated to me that the attorneys were there for one remedy, and one remedy only, and that was the invalidation of at-large elections and the substitution of district elections.

Senator SPECTER. But, Judge Kennedy, was that not made in the context that that is what he wanted and did not want to accept any compromises?

And when you say that the parties have the right to determine the shape of the lawsuit, I understand what you are saying. We had discussed in the context of this case the issue as to whether a court ought to consider on appeal issues which were not raised by the parties.

And it seems to me that as to procedural matters, there is a broader responsibility on the court. Now, we are not talking about breaking new ground and about establishing new rights, and no generalizations, but a broader responsibility of the court to do justice where there are procedural issues involved.

And I can see a lawyer making the argument to you, no, Judge, this is what I want, all or nothing. And it is really in the context, in a sense, of putting the court's back to the wall as a far as a litigant can.

But in the context where the facts were as present here, where there was really injustice to Mexican Americans under this circumstance, and important factors on location of polling places and hiring by commissions, is there not a responsibility for a court of appeals to mold the verdict, to mold the finding to do justice under the circumstances?

Judge KENNEDY. The law that we were applying at the time was that the remedy had to fit the violation, and the insistence was that this was the only remedy they wanted. And I was sufficiently concerned about it that I wrote the separate opinion indicating with every hint I could that I was very concerned about some substantive violations, but that I had to agree with my colleagues that the remedy was not permitted.

Senator SPECTER. But another remedy could have been ordered.

Judge KENNEDY. Certainly.

Senator SPECTER. Why not?

Judge KENNEDY. Yes, I think another remedy could have been ordered. So I think all we are talking about is whether or not I as a single judge should have said that I would remand. I certainly did

not have that authority because I did not have the votes. I did not have the authority to write the mandate in this case.

Senator SPECTER. Do you recall whether you raised that issue specifically with the other two judges on the panel?

Judge KENNEDY. I cannot recall.

Senator SPECTER. One final point, Judge Kennedy, and it follows up from our discussion earlier today with respect to framers' intent and then one of my colleagues had raised the subject again and had talked about the difference on electronic surveillance on the fourth amendment where electronic surveillance was not known at the time the fourth amendment was adopted.

But that seems to me to be a very different consideration from the one which you and I had discussed previously, and that involves the framers' intent in the issue of segregated schools on the basic question to the propriety of the court in some extraordinary circumstances making a conclusion which is directly contrary to the framers' intent.

And in the discussion which you had today you talked about the fact that it was not subjective intent that the framers were looking toward, and my question is what kind of intent is there besides the intent in the minds of the individuals who frame the amendment.

Whether you call it subjective intent or objective intent, what is there besides what they are thinking about, as reflected by the facts surrounding the times when D.C. schools were segregated and schools were segregated all over the country and the gallery in the Senate was segregated?

They must have had in mind the segregation because that was the only fact of life that they knew.

Judge KENNEDY. That may have been, but they committed themselves to something that in legal consequence was entirely different, and they simply have to bear the consequences of that decision.

They made an agreement among themselves that racial discrimination would not be permitted when it was at the behest of the State, and I think they are bound by the consequences of what they did, regardless of whether——.

Senator SPECTER. Well, Judge, when you say the legal consequences, they committed themselves to legal consequences which were something different. I agree with the morality, the propriety, and the prevailing law on the subject, but I just do not see how you can say that they agreed to those consequences, given their understanding of what was happening in, their world.

Our world is different. The world was different in 1954 with *Brown* v. *Board*, but what seems to me to come through from your approach, and quite properly so, but I think this is an important principle, is that there are some extraordinary cases where there is an appropriate finding by the Supreme Court of the United States, as they did in *Brown* v. *Board of Education*, which goes right into the teeth of the intent of the framers who wrote the Equal Protection Clause of the fourteenth amendment.

Judge KENNEDY. Well, I guess, again, it comes down to a difference of the use of the term "intent."

Senator SPECTER. Is there any question in your mind about the Equal Protection Clause applying beyond blacks to women, to aliens, to indigents, to mentally retarded?

Judge KENNEDY. No. In fact, once again, the framers could have drafted the amendment so that it applied to blacks only, but they did not. They used the word "person."

Senator SPECTER. And is there any question in your mind about the propriety of the longstanding rule in the Supreme Court of the United States about the clear and present danger test or freedom of speech?

Judge KENNEDY. I am not sure that the clear and present danger test is a full description of the full protection that the Court gives to freedom of speech. I think *Brandenburg* goes a little further than the clear and present danger test.

Senator SPECTER. So you have the clear and present danger test, plus *Brandenburg* v. *Ohio*——

Judge KENNEDY. Yes.

Senator SPECTER [continuing]. And *Hess* v. *Indiana*, and you agree with that statement of the——

Judge KENNEDY. I know of no substantial, responsible argument which would require the overruling of that precedent.

Senator SPECTER. I know of none either, but some do.

That concludes my questioning. Thank you very much, Judge Kennedy.

Judge KENNEDY. Thank you, Senator.

Senator SPECTER. Thank you, Mr. Chairman.

The CHAIRMAN. Judge, you just proved that you did not listen to any of the Bork hearings. We take you at your word.

Do you have anything to say, Senator?

Senator THURMOND. I have nothing else to say. I again want to commend Judge Kennedy for the way in which he has handled himself, and I hope we will not extend these hearings unduly.

If the members would stay here and listen to questions asked, they would not have to ask them over and over and over again, and that is what is happening. We apologize to you.

Judge KENNEDY. Well, no apologies are necessary, Senator.

Senator THURMOND. Of course, they have a right to do that, but at the same time it takes a lot of time from all the people who are attending, and I just hope we can speed along.

Judge KENNEDY. No apologies are necessary, and I appreciate, Mr. Chairman and Senator, the great consideration and courtesy that you have shown to me and my family. We have enjoyed it.

The CHAIRMAN. Well, Judge, as you can verify now, the Senator from South Carolina—when they said "with all deliberate speed," they really meant it. He wanted to schedule your hearing 1 week after the President had named you and 3 days before your name was sent up, so he is always moving along rapidly.

I think that our colleagues asked very good questions, and we seldom disagree, but, Boss, it went smoothly. Here we are at 6 o'clock; we are about to close down, and so I hope you have a good dinner.

Let me ask one thing of the staff. Is there any Senator on his way to ask further questions?

[No response.]

The CHAIRMAN. I have some questions on criminal procedure which I will submit to you in writing, Judge. There is no hurry, obviously. As you know, because of the Senate schedule, we will not be back in until the end of January, so we will not vote on your nomination in committee until we get back.

Senator THURMOND. Well, Mr. Chairman, I was hoping you would change your mind and vote tomorrow when we finish, or the next day.

The CHAIRMAN. I thought you might, Senator, in contravention of our own rules. You know, all the breaks I cut this man—he does not cut me any on this score. All kidding aside——

Judge KENNEDY. I will abide by the will of the Senate, Senator.

The CHAIRMAN. Judge, you have every reason, in my view, to have a happy holiday. I appreciate your answering the questions. You have kept your commitment that you would discuss in broad terms the issues and the constitutional questions. You did that; we much appreciate it.

And unless Senator Thurmond has something good to say about the way the hearings have been conducted, I am going to close.

Senator THURMOND. Well, I think you, Mr. Chairman, are very fair and I want to congratulate you for your fairness.

The CHAIRMAN. Thank you.

Senator THURMOND. I hope you and your family go out and have a nice dinner, get a good night's rest, and we will see you tomorrow morning.

The CHAIRMAN. Hopefully, you will not have to see him tomorrow morning because I do not think we are going to have to call——

Senator THURMOND. Are we through?

The CHAIRMAN. Yes. I do not think we are going to have to——

Senator THURMOND. Well, if that is the case, we will excuse you, then.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. In case you observed, I am no longer the Chairman. I just do this, you know. [Laughter.]

Senator THURMOND. Are you going to excuse him, too?

The CHAIRMAN. Well, Senator, if you have excused him, then there is no reason for me to excuse him.

I would just like to thank your family. I realize it is both boring and tedious to sit back there not able to move all this time for 2 days, but we truly appreciate it.

With your permission, Mr. Chairman, I will recess for the day.

Senator THURMOND. What time are you going to meet tomorrow?

The CHAIRMAN. We will start tomorrow—we were going to start at 10. You asked me to start at 9:30. We will start at 9:30 tomorrow.

Senator THURMOND. Thank you very much. You are very accommodating and I appreciate it.

Judge, if everybody is through with you, again, I just want to compliment you on the great service you have rendered, and say again I do not think anybody could be selected who is better qualified for the Supreme Court.

You have practiced law, you have taught law, you have been on the court, you have been a judge; you have been reasonable, you

have been fair, and there is no reason in the world why anybody should raise complaints about your conduct and about your career and history. In my opinion, you will be confirmed.

In the meantime, though, I hope you will have a nice Christmas and you will get a fine message from us. The Chairman and I are going to do all we can to confirm you when we come back.

Thank you very much.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. Judge, Senator Heflin indicated he will have a few questions in writing.

Now that I have gotten my marching orders from the Senator from South Carolina, we will recess. We will not call you back tomorrow, and I do not expect to call you back at all until this hearing is concluded. The next action would be a vote on your nomination in the committee.

We will resume tomorrow at 9:30. The American Bar Association will be the first to testify and then we will have public witnesses who, in all probability will take Wednesday and Thursday, but we will see how the day goes.

Thank you very much, Judge, and we thank your family.

Judge KENNEDY. Thank you very much.

The CHAIRMAN. The hearing is recessed.

[Whereupon, at 6:02 p.m., the committee was adjourned, to reconvene at 9:30 a.m., Wednesday, December 15, 1987.]

NOMINATION OF ANTHONY M. KENNEDY TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, DECEMBER 16, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:41 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr., chairman of the committee, presiding.

Present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

Senator KENNEDY. We will come to order.

The chairman of the committee, Senator Biden, as all of us know, travels down daily from Delaware to attend to his Senate duties. On the train down this morning, there was a slight mishap, a mechanical failure. I have talked to him in the last several minutes, and it seems that everything has been cleared away. But he will be necessarily late and has asked us to proceed with the hearings this morning. He did request that individuals be given 10 minutes for the opening statements and members of panels 5 minutes for opening statements. He would also request that the questioning be limited to 15 minutes per questioner.

So with that understanding, we will look forward to hearing from our first witnesses this morning. The first is the Hon. Harold Tyler. Judge Tyler serves as the chairman of the Standing Committee of the Federal Judiciary on the American Bar Association; second, Mr. J. David Andrews, who is the ninth circuit representative on the standing committee. Then we have John C. Elam, of Columbus, Ohio, who is the sixth circuit representative on the standing committee; and John D. Lane, of Washington, D.C., the federal circuit representative on the standing committee.

I want to welcome Judge Harold Tyler, the chairman of the ABA Standing Committee on the Federal Judiciary. Judge Tyler is currently a partner in the highly respected law firm of Patterson, Belknap, Webb and Tyler in New York. He previously was a federal judge in the southern district of New York, and from 1975 through 1977 was Deputy Attorney General of the United States.

Judge Tyler, welcome. I know that your service as chairman of the ABA standing committee is often a thankless job, and the committee is often praised by those who agree with its conclusions and condemned by those who do not. But all of us appreciate the ex-

traordinary amount of work that its members contribute to improve the administration of justice in this country. We look forward to your testimony.

Judge Tyler, I will ask you if you would be good enough to take the oath. We will follow the usual procedure of swearing in all of our witnesses. Since all of them will be testifying, I would ask that they all rise, please.

Do you swear to give the truth, the whole truth and nothing but the truth, so help you, God?

Judge TYLER. I do.

Mr. ANDREWS. I do.

Mr. ELAM. I do.

Mr. LANE. I do.

Senator KENNEDY. Judge Tyler, do you want to proceed so that we might have the report from the American Bar Association?

TESTIMONY OF PANEL CONSISTING OF HAROLD R. TYLER, JR., CHAIRMAN; J. DAVID ANDREWS, MEMBER, NINTH CIRCUIT REPRESENTATIVE; JOHN C. ELAM, MEMBER, SIXTH CIRCUIT REPRESENTATIVE; AND JOHN D. LANE, MEMBER, FEDERAL CIRCUIT REPRESENTATIVE, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION

Judge TYLER. Thank you, Mr. Chairman, and good morning, gentlemen.

We on the American Bar Association Standing Committee for the Federal Judiciary commenced our investigations in respect to the nominee, Judge Anthony Kennedy, on November 11th. We finished our work on December 7th, and I reported in short form on behalf of the committee to Chairman Biden that we had unanimously concluded that we should rate Judge Kennedy as well qualified for consideration for the Supreme Court of the United States.

As the members of the Senate Judiciary Committee are certainly aware, the rating of well qualified is the highest rating under our procedures that we could possibly vote for any Supreme Court candidate.

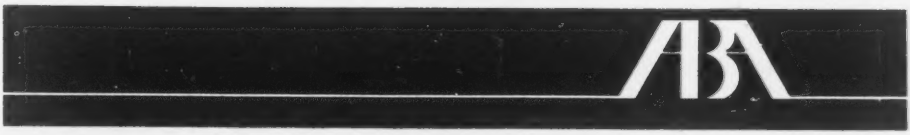
In the course of our investigation, we interviewed in excess of 480 judges, practicing lawyers and people in academic life in the legal world across this country. We asked the three law schools in the United States—the University of Pennsylvania Law School, the Vermont Law School, and Fordham University Law School—to assist us in appraising and reviewing the opinions of Judge Kennedy, more than 430 in number. A team of lawyers in my own office also assisted us in reviewing the opinions of the nominee.

I should hasten to add that, in addition, three members of our committee interviewed Judge Kennedy face to face in San Francisco, California, on or about November 30th.

As a result of that investigation which I have summarily described, we as a committee met and unanimously concluded that Judge Kennedy was entitled to our highest rating.

I will say no more, Mr. Chairman, subject, of course, to any questions which you wish to pose in the course of our appearance here this morning.

[The statement of Judge Tyler follows:]



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STATEMENT

OF

HAROLD R. TYLER, JR.

STANDING COMMITTEE ON FEDERAL JUDICIARY
AMERICAN BAR ASSOCIATION

CONCERNING THE

NOMINATION OF

THE HONORABLE ANTHONY M. KENNEDY

TO BE THE

ASSOCIATE JUSTICE

THE SUPREME COURT OF THE UNITED STATES

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

DECEMBER 16, 1987

Mr. Chairman and Members of the Committee:

My name is Harold R. Tyler. I practice law in New York City, and I am Chairman of the American Bar Association's Standing Committee on Federal Judiciary. I appear here to present the views of the American Bar Association on the nomination of the Honorable Anthony M. Kennedy, Judge of the United States Court of Appeals for the Ninth Circuit, to be Associate Justice of the Supreme Court of the United States.

At the request of the Attorney General, our Committee investigated the professional competence, judicial temperament and integrity of Judge Kennedy. Our work included discussions with 480 persons, including (1) the Justices of the Supreme Court of the United States and many federal and state judges throughout the country; (2) practicing lawyers throughout the country; (3) law school deans and faculty members, including constitutional law and Supreme Court scholars; and (4) Judge Kennedy himself, who was interviewed by three members of our Commitee. Panels of law professors from three distinguished law schools and a separate group of practicing lawyers reviewed Judge Kennedy's published judicial opinions for the Committee.

The Committee commenced its investigations of Judge Kennedy on November 11 and completed its work on December 8, 1987. This report was prepared after the latter date.

This Committee is satisfied that its investigations reveal that Judge Kennedy's integrity is beyond reproach, that he enjoys justifiably a reputation for sound intellect and diligence in his judicial work and that he is uniformly praised for his judicial temperament. Hence, we have concluded that Judge Kennedy is among the best available for appointment to the Supreme Court of the United States from the standpoint of professional competence, integrity and judicial temperament and that he is entitled to this Committee's highest evaluation of a nominee to that Court because of the high standards which he meets. Accordingly, this Committee has unanimously found him "Well Qualified".

Thank you very much.

2536M

Senator KENNEDY. Do other members of the panel choose to make any comments or will they just respond to questions?

Judge TYLER. I think at the moment they would agree with me we will be prepared to respond to questions.

Senator KENNEDY. I believe we have submitted the report, and it has been made a part of the record. If it is not, we will ask that it be made a part of the record.

[The ABA report follows:]

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December 15, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Judge Anthony M. Kennedy

Dear Mr. Chairman:

This letter is submitted in response to the invitation of your Committee to the Standing Committee on the Federal Judiciary of the American Bar Association (the "Committee") to submit its views with respect to the nomination of the Honorable Anthony M. Kennedy to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Judge Kennedy is based on its investigation of his professional competence, integrity and judicial temperament, as defined in the Guidelines of the Committee.

The Committee investigation in recent weeks included the following:

1. Members of the Committee interviewed the Justices of the Supreme Court of the United States, colleagues of Judge Kennedy on the Court of Appeals, judges who have worked closely with Judge Kennedy on Judicial Conference committees and a large number of other federal and state judges throughout the country, including judges who are women or members of minority groups.

2. Committee members interviewed a cross-section of practicing lawyers across the country, including former law clerks of Judge Kennedy.

3. Committee members interviewed a number of Deans and faculty members of law schools in the United States, including a number of colleagues of the nominee at McGeorge Law School.

4. Members of the faculty of three law schools, Fordham University, the University of Pennsylvania and Vermont Law School, divided the task of evaluating the published opinions of Judge Kennedy throughout his career as a member of the Court of Appeals for the Ninth Circuit. In addition, all of the opinions of Judge Kennedy were reviewed by a group of lawyers in the office of the Chairman of the Committee.

5. The Committee reviewed the relatively few available speeches of Judge Kennedy.

6. Three members of the Committee interviewed Judge Kennedy in person on November 30, 1987. In addition, the chairman talked with the nominee by telephone on several occasions.

Professional Background

As is surely known to the Senate Judiciary Committee, Judge Kennedy's career includes service as a practicing lawyer, a Federal Circuit Judge and a law school professor. He received a Bachelor of Arts degree with great distinction from Stanford University in 1958. He also attended the London School of Economics and Political Science at the University of London. He then attended Harvard Law School, from which he graduated cum laude in June, 1961, with an LL.B. degree. He was admitted to the bar of the State of California in 1962.

In the fall of 1961, he entered private practice as an Associate in a San Francisco law firm. Following the death of his father, he left San Francisco in 1963 to return to Sacramento, where he assumed charge of his late father's law practice. He continued to practice law in Sacramento from December, 1963 until May, 1975, when he was appointed a United States Circuit Judge for the Court of Appeals for the Ninth Circuit by President Gerald Ford. Since 1965, he also has served as an Adjunct Professor of Law at McGeorge Law School, located in Sacramento, where he taught constitutional law.

Interviews with Judges

Of the more than 480 persons interviewed by this Committee, over 300 are federal and state judges. All of those judges who had direct knowledge of Judge Kennedy's professional work spoke positively about his intellect, his thoughtful analyses of legal problems presented to him, both as a lawyer and a judge, his

writing ability and his collegiality. He has been described by various judges as "studious", "always well prepared", "collegial" and "willing to listen to the submitted facts and law from the parties and their counsel."

Those judges who do not personally know Judge Kennedy have a favorable impression of him based on his reputation and their readings of his opinions.

In sum, the judges interviewed by this Committee looked favorably on Judge Kennedy's nomination.

Interviews with Lawyers

The Committee interviewed approximately 100 practicing lawyers throughout the United States, many of whom have appeared before a panel of the Ninth Circuit of which Judge Kennedy was a member. On the whole they spoke affirmatively about the nominee's intellect, temperament and integrity. Specifically, some recalled that "the Judge was always well prepared and asked pertinent questions"; that the Judge had a perceptive and inquiring mind; and that "he was always fair and willing to listen." Other lawyers who knew the Judge only by reputation were universal in their praise of his reputation for decency, sound scholarship and willingness to decide cases on a case-by-case basis without a particular preordained agenda or set philosophical approach to the relevant areas of the law.

Interviews with Law School Deans and Faculty Members

The Committee interviewed more than 80 law school deans and faculty members, including his colleagues at McGeorge Law School and others who know Judge Kennedy only by reputation or through occasional review of his opinions. None of these people in academic life reported adverse or unduly critical opinions of Judge Kennedy. Indeed, he was praised for a willingness to be fair, to write with attention to all issues in each case, and to proceed with reasonable thoroughness in his legal analyses.

Review of Judge Kennedy's Written Opinions

Three law schools were asked to divide, study and comment on Judge Kennedy's opinions. The Fordham University Law School reviewed Judge Kennedy's constitutional law opinions in areas other than the First Amendment and certain of his criminal law opinions. Vermont Law School reviewed his environmental law opinions and certain administrative law opinions, together with his statutory civil rights opinions. Finally, the University of

Pennsylvania Law School reviewed Judge Kennedy's First Amendment, antitrust, securities and labor law opinions.

Moreover, as heretofore stated, a team of lawyers in the office of the undersigned reviewed all of Judge Kennedy's reported decisions as a Circuit Judge.

The consensus reached by all of the reviewers, whether strongly affirmative or more reserved in their approval, was that Judge Kennedy's opinions are on the whole technically and persuasively crafted, fair and even-handed and generally do not go beyond points at issue. Indeed, it is part of this consensus, in which the members of this Committee concur, that Judge Kennedy has not been prone to give long, expository opinions reflecting his philosophy, but rather uses his analytic and writing skills to deal with the issues raised by the litigants and their lawyers. Most reviewers specifically commented favorably about his judicial temperament. By way of illustration, most noted his fairness and his effort to give parties and their lawyers a sense that their arguments were listened to, carefully considered and decided on the basis of the record. Moreover, it was frequently commented that no bias was discerned; and Judge Kennedy always has endeavored to convey a sense of balance, compassion and fairness. Hence, he was frequently described as a "lawyers' judge" or a "litigants' judge". There were occasional minor suggestions that some of the nominee's opinions disclose that he is not always "a good teaching judge." The characteristics giving rise to this concern did not predominate over the great bulk of his opinions and, in the view of the Committee, were not of sufficient significance to affect the Committee's conclusions.

Conclusion

This Committee is satisfied that its investigations reveal that Judge Kennedy's integrity is beyond reproach, that he enjoys justifiably a reputation for sound intellect and diligence in his judicial work and that he is uniformly praised for his judicial temperament. Hence, we have concluded that Judge Kennedy is among the best available for appointment to the Supreme Court of the United States from the standpoint of professional competence, integrity and judicial temperament* and that he is entitled to

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* This Committee confines its investigation to these three criteria. As in investigations of lower court nominees, it does not investigate a nominee's political or ideological philosophy "except to the extent that extreme views on such matters might bear upon judicial temperament or integrity."

this Committee's highest evaluation of a nominee to that Court because of the high standards which he meets. Accordingly this Committee has unanimously found him "Well Qualified".

This report is being filed at the commencement of the Senate Judiciary Committee's hearings. We will review our report at the conclusion of the hearings and notify you if any circumstances have developed that dictate modification of the views herein expressed.

Respectfully submitted,

Harold R. Tyler, Jr.
Chairman

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Senator KENNEDY. I have a question, Judge, and that is, I want to be clear on the standing committee's conclusion with regard to Judge Kennedy's former membership in the Olympic Club. It seems clear that you did not believe that his former membership affected your overall assessment of his qualifications for the Supreme Court, largely because he had tried to change the discriminatory policies and because he had resigned when the club's membership refused to change those policies.

My question is: Would the ABA standing committee view a federal judge's continuing membership in an exclusive club that discriminated on the basis of race or sex as adversely affecting the nominee's qualifications for elevation to a higher federal court?

Judge TYLER. Well, of course, what happened, we, as you know, looked into this considerably. Earlier, Chairman Biden wrote us a letter pointing out the language of Canon 2 of the Judicial Canon of Ethics. You fairly summarized, I think, how we came out. Because of what happened, our committee unanimously concluded that this business of membership in the Olympic Club was not a disqualifying factor here at all.

Very briefly, the record, as we understand it, is that he was a non-voting, non-resident member for years. Back early in 1987, it came to his attention, when the open golf tournament was played in the Bay area, and I think also through an article which appeared in the New Yorker Magazine dealing with the history of the Olympic Club, that nothing had been done to change the rules about admission of women and perhaps minorities. He then endeavored to work within to persuade the officers and others who had control of club policies to change. They had a referendum; it did not come out the way he hoped. I think your committee has before you copies of two letters that he wrote in August of this year about the problem to counsel for the club. Finally, he resigned early this fall.

I suppose that one could say, looking at this record, that maybe he might have been more sensitive to the problem earlier than he was, but we concluded that, on balance, he behaved in a respectable, responsible fashion and tried to live up to the sensible commands of canon 2.

Furthermore, I think it is perfectly fair, as your question suggested, Mr. Chairman, that this matter should be looked into, and I hope you understand that we do the same in respect to this problem, not only with regard to Supreme Court of the United States nominees, but, as well, lower court nominees.

Finally, I would say, as I am sure the committee is aware, if you read the commentary under Canon 2 of the Judicial Ethics, that commentary makes two things very clear: First of all, what is invidious discrimination practiced by an organization is a complex question; and, second, in the last analysis, of course, the canon leaves it up to the conscience and good sense of the judge himself.

It seems to us, that it is important to keep in mind those two commentaries when this kind of a problem is appraised.

Senator KENNEDY. Your ABA standing committee on the ethics and professional responsibility explained the term "invidious discrimination" as follows: An organization ordinarily would be considered to discriminate invidiously when it is exclusive, rather than

inclusive; excludes from membership persons solely on the basis of their race, sex, religion, or national origin; and, third, such exclusions stigmatizes such persons as inferior. It does not, in that particular term, use the expression that there had to be an intention of those that drafted the bylaws; effectively, what you are talking about is the effect of those rules, regulations, standards, are you not?

Judge TYLER. Well, you see, the courts deal with the concept or phrase "invidious discrimination" on the whole by viewing it as a problem of whether or not there was intentional or purposeful discrimination. Some people think that that is not the way to approach the problem.

Senator KENNEDY. What is your position?

Judge TYLER. Some people argue that you should only view this as to the effect. I do not think that it is terribly significant to argue that point one way or another. I think the real problem, and I think the way we approached it in our deliberations, was: Was there any evidence that Judge Kennedy purposely intended to be part of an organization that purposely discriminated against somebody? Second, we construed it in terms of what was the effect and what did he do about it.

It is on those two broad approaches that we viewed the problem and concluded that, under the facts that are pretty well known now, this history—particularly with respect to the Olympic Club—is not a disqualifying factor.

Senator KENNEDY. I am as interested right now to try and find out what the standard is in terms of future judges. It is an important message as well.

If I can just mention this point, if you have a situation where as a result of existing regulations, and it is a business club and the effect of whatever the rules and regulations or understandings all is to deny the involvement of women in a club where business associations and meetings and contacts take place, or denies the opportunity for minorities to participate, would you find it permissible—or do you find it objectionable—for members of the federal judiciary to continue membership in those clubs?

Judge TYLER. Yes, I think we would. That is why I said a few moments ago that it does not only apply to Supreme Court nominees.

Senator THURMOND. Judge Tyler, do you mind speaking in your microphone so we can hear you better?

Judge TYLER. I beg your pardon. I will do that, Senator.

As I said a few moments ago, I think where, as you point out, the record shows that a club is really used for business and professional associations, meetings and so on, a judge should really, under canon 2 and common sense, avoid that type of place. It leaves open, however, the question of whether or not he should attempt to persuade, for a while at least, that organization to change its policies.

I mention that because this has occurred recently in my own city of New York where we have now a law which deals with this very problem.

Second, also, of course, I think our committee has to be concerned whether or not a judge is continuing to be a member of a club where he is well aware that there is purposeful activity to dis-

criminate against women and minorities So long as that is truly a club where it is not small and it is not confined closely to simple social events, et cetera.

I do not think there is any doubt that this committee for some time has been concerned about approaching the problem on these two levels.

Senator KENNEDY. I appreciate your response. I know you agree that it is vitally important that all segments of the population have confidence in the fairness and the impartiality of the judiciary, and a judge's membership in a discriminatory club obviously undermines that confidence. A judge who hears a gender discrimination case in the morning and then has lunch at an all-male club is just not going to inspire the public's confidence.

Judge TYLER. Yes. You are dealing, of course, with the appearance problem. We would agree that the appearance problem, among others, is important.

Mr. ELAM. Senator Kennedy?

Senator KENNEDY. Yes?

Mr. ELAM. My name is John Elam. I was a member of the group that interviewed Judge Kennedy. You mentioned lessons for others. I think that our group was impressed in connection with this club that in the summer of 1987, before he was under consideration, he struggled with this question, brought it up to the board, and then took action in that he ultimately resigned. We were impressed by the fact that he was, over a period of time, increasingly sensitive. And I believe if you are asking what does this tell others in the future, I think his action expresses something that he came to over time and advanced his consideration for a position on the Supreme Court.

Senator KENNEDY. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

I am not too convinced that someone should be disqualified if he belongs to a group of men who want to just meet in a personal way, or if a woman wants to belong to a women's group that wants to meet in a personal way. For instance, you may have a group of women who have a sewing club. Why shouldn't they be allowed to have that without having men required to be there?

In other words, I am not too sure that—a few years ago we have a very high ranking officer, I think it was William French Smith, I believe, who was one who belonged to some club, and he feels there is nothing wrong with that whether there is no discrimination of those of the same category. After all, there are some differences in sexes, and there are some differences in other ways of people. So long as there is no intent to discriminate and so long as they will not discriminate when it comes to their official duties; but when it is purely personal, it seems to me it is a little different situation. People ought to be allowed to choose their own associates. I just want to throw that out to you.

Now, I want to ask this question of Judge Tyler. Judge Tyler, I believe you gave Judge Kennedy—or your committee did—the rating of well qualified. Is that correct?

Judge TYLER. Yes, correct.

Senator THURMOND. The rating of well qualified is based, as I understand it, on three factors, more or less: integrity, judicial temperament, and professional competence. Is that correct?

Judge TYLER. That is correct.

Senator THURMOND. Also, I understand that the persons in this category must be among the best available for appointment to the Supreme Court. Is that correct?

Judge TYLER. That is certainly correct.

Senator THURMOND. Now, you made a very searching investigation, I presume, of Judge Kennedy in all aspects and came up with that final rating.

Judge TYLER. We did.

Senator THURMOND. Do you know of any reason that Judge Kennedy should not be confirmed for the Supreme Court?

Judge TYLER. Well, accepting our limited role and confining my answer only to that limited role, we know of none.

Senator THURMOND. So, as I understand it, your committee recommends that Judge Kennedy be confirmed?

Judge TYLER. We certainly agree that under our criteria——

Senator THURMOND. That is a——

Judge TYLER. Under our criteria, we certainly agree.

Senator THURMOND. Mr. Andrews, I believe you are a member of this committee. Do you agree with the conclusion of Judge Tyler?

Mr. ANDREWS. Very definitely.

Senator THURMOND. Mr. Elam, I believe you are a member of this committee. Do you agree with the conclusion of Judge Tyler?

Mr. ELAM. As he stated it, yes.

Senator THURMOND. Mr. Lane, how do you feel?

Mr. LANE. I certainly agree.

Senator THURMOND. Judge Tyler, were there any dissenting votes in your committee on this matter?

Judge TYLER. None, sir.

Senator THURMOND. In other words, your entire committee, every member favored approving Judge Kennedy for the Supreme Court?

Judge TYLER. We all agreed, all fifteen, that his integrity, professional competence, and judicial temperament made it very clear that he deserved our highest rating.

Senator THURMOND. And therefore your committee unanimously recommended Judge Kennedy for appointment to the Supreme Court?

Judge TYLER. We did.

Senator THURMOND. I have no other questions. Thank you very much, Mr. Chairman.

Senator KENNEDY. Senator Metzenbaum.

Senator METZENBAUM. Judge Tyler, it is good to have you before us again, particularly with my old friend, John Elam, from my own State. I just have a couple of questions.

On page three, I guess it is, you talk about interviews with lawyers. You say, on the whole they spoke affirmatively about the nominee's intellect, temperament, and integrity.

Your report is so effusive in its praise, that I am interested in knowing what, if any, negatives did come up. I do not want to canonize Judge Kennedy, and I would like to find, if there were some negatives, what they were.

We do not expect nominees for the Supreme Court, nor do we expect Senators, not to have some negatives. Can you tell us something of those negatives, even though you did not consider them significant enough to make a point.

Judge TYLER. Very simply, Senator Metzenbaum, as always, we encountered a few lawyers who were probably result-oriented as much as anything else. In other words, frequently, with lawyers, it depends on whether or not you and your client won or lost.

Senator METZENBAUM. Never. As a former practicing lawyer, never.

Judge TYLER. I must say, in fairness, though, there were one or two who did say that they thought that in connection with certain appeals which they handled, that he might have gone further in his discussion of the issues, and that sort of thing. But no one suggested, even those who were result-oriented, or quarreled a little bit with the opinions, doubted his integrity or his intellectual ability, and his willingness to try to address the issues in the case and not do any more.

Senator METZENBAUM. Thank you. I want to say that I stand shoulder to shoulder with Senator Kennedy, and many of us on this committee, on this question of judges being a member of a discriminatory club, or clubs. Yet in saying that, I also have to tell you, that I feel somewhat sensitive about the fact that we in the United States Senate act in connection with civil-rights laws, fair-housing laws, equal-employment laws, discriminatory laws with respect to women, and, yet I know that some Members of the United States Senate who are acting in connection with such laws are indeed members of clubs that have discriminatory policies with respect to women, and with respect to minorities.

And so I must tell you that—not that it is specifically relevant, but maybe confession is good for the soul. I am not confessing that I am a member of such a discriminatory club.

But I think that the United States Senate, makes this a very strict criterion in connection with the judicial appointments. I am not sure we turn it around on ourselves, and we probably do not have any opportunity to do that because, in the last analysis, the only people who can judge us are those of our own constituencies.

Whereas, in this case, we, in the Senate, and you, in the ABA, are in a different role. I thought I'd comment on that. I do not need any response from you, but I do feel a sense of sensitivity in this area with respect to our own House. Thank you, Mr. Chairman.

Senator KENNEDY. The Senator from Utah. Senator Hatch.

Senator HATCH. Well, I would like to welcome each of you here, and we appreciate the work that you attempt to do in all of these matters. It is a lot of work, and you do not get much thanks for it, and sometimes you get beaten up pretty badly for it.

And I have been in both positions, where I have thanked you, and also found a great deal of fault.

In looking at what Senators Kennedy and Metzenbaum have drawn your attention to, the Olympic Club, did you consider the fact that Judge Kennedy had resigned from the Del Paso Country Club due to a perception problem over women members, and did you find—if you did look at that—that that illustrated the necessary sensitivity to these problems and issues?

Judge TYLER. That is really why I pushed aside the other three clubs, Senator Hatch. We obviously looked. One of the clubs I, personally—and I think most of my colleagues agreed—really is not a club in the true sense we are discussing this under, say, the heading of canon 2. When you join a athletic club which you pay a fee for, and all members are—as long as they pay the fee—I do not consider that a private club.

The country club was a small place where it turned out—as we found out at least—there were no set policies against minorities or women anyhow. And then of course there was the Sutter Club which he had resigned because he was uncomfortable with what their attitudes were as long ago as seven years ago. That is so.

Senator HATCH. Well, that is good. Part of the point with regard to the Olympic Club is that the real sense of the problem did not even arise until the U.S. Open last summer, is that correct?

Judge TYLER. Well, I think that one could say that is not literally, perhaps, a total answer to the question because they had apparently had policies for many years. What we looked at, though, was the fact that the open tournament sort of brought this probiem out in the open, along with the article in the New Yorker Magazine.

We recognize that the Olympic Club is a very large organization. It is not what you would call a small, private kind of affair, and therefore, we thought it was important to inquire deeply, in not only the interview sense, but any other information we could obtain.

But as has been pointed out already, we believe that he was sensitive to the issue when it surfaced, and then he tried to do something about it. Perhaps it could be said he should have been more alert earlier, but we did not think that that was important now, and that is why, among other reasons, we did not think it was a disqualifying factor in connection with his nomination and these hearings.

Senator HATCH. Well, I appreciate that. Now, as I understand it, your committee unanimously rated Judge Kennedy well-qualified which is the highest rating he could be given for the Supreme Court. Is that correct?

Judge TYLER. That is correct.

Senator HATCH. Now my own review of his record has left me with the impression that he will be a fine addition to the Supreme Court, and we have extensively reviewed his record.

But let me just review, for the record, the degree to which your committee did examine Judge Kennedy's background.

For instance, how many federal judges did you interview in your investigation?

Judge TYLER. Well, including State judges, and federal judges, we interviewed a little over three hundred. I would guess—and I have not got the figures right in front of me—that we talked to about 260 federal judges at all levels.

Senator HATCH. I see. Well, that group included members of the Supreme Court as well, is that correct?

Judge TYLER. Yes, sir.

Senator HATCH. As well as district and circuit court judges?

Judge TYLER. Right. That is correct.

Senator HATCH. And you interviewed State court judges as well, generally supreme court chief justices?

Judge TYLER. Generally appellate, high-court judges in the several States. That is correct.

Senator HATCH. All right. And some of those, I take it, were chief judges of the supreme court?

Judge TYLER. That is so.

Senator HATCH. Were the judges that you interviewed basically from the geographical area of the Ninth Federal Circuit, or, were they from all over the country?

Judge TYLER. No. Across the country. Of course we made a special effort to interview Judge Kennedy's colleagues on the ninth circuit.

Senator HATCH. Sure.

Judge TYLER. But we covered the whole countryside.

Senator HATCH. Yes, that is my understanding. How many lawyers did you interview concerning Judge Kennedy?

Judge TYLER. Well, as we say in the letter—but this is sort of a shifting thing because sometimes lawyers' reports come in late. A little over a hundred. We might have done more except that we got such uniformly good reviews on the whole. As I explained to Senator Metzenbaum, we had some minor criticisms, but, uniformly, the reports were so good that we decided that there was no need of just building up the statistics in that area.

Senator HATCH. That is great. I understand, then, that you also interviewed lawyers nationwide, although I am sure you had to interview a lot of lawyers in the area where he is best known?

Judge TYLER. Well, of course the main burden, quite understandably, fell within the ninth circuit, which, as you all know is a large circuit. Mr. Andrews, who is here this morning, and our other ninth circuit member, Samuel Williams—who would have been here except he suffered a serious illness last week, much to our discomfiture—of course spent a lot of time interviewing lawyers who had appeared before a panel of which Judge Kennedy was a member.

Also, our second circuit representative, Mr. Willis of New York City, and I, interviewed lawyers in New York who argued before Judge Kennedy, and they were more or less—as I said to Senator Metzenbaum—very affirmative about him.

Senator HATCH. As I understand it, these included lawyers who had lost cases, as you have stated before?

Judge TYLER. Well, occasionally, they were a little disgruntled, but even they had to recognize that he was a pretty good judge.

Senator HATCH. Sure. How many deans, law professors, and scholars did you interview in reaching your opinion?

Judge TYLER. Slightly in excess of eighty, and my recollection is something like eighty-four.

Senator HATCH. All right. What was the extent of your review of his written opinions?

Judge TYLER. Well, first of all, in the early going, we commenced our work on December 11th, as I said to the Chairman—November 11th, I am sorry. I decided, as Chairman, that we ought to get several law schools involved because of the time problem, and, frankly, because I would like to see as many law schools get involved in

these inquiries because they are very proud and eager to do this work, for which we are eternally grateful, by the way.

Also, as you would well understand, in the ninth circuit, the judges have occasion to hear a number of environmental-law cases of significance beyond the reach of the ninth circuit. I asked the Vermont Law School, which has a very reputable group of environmental-law people, to participate for that reason.

Senator LEAHY. I see that was a good time to come in.

Judge TYLER. Yes. And I hope Senator Leahy will agree with me that they do have this capacity, because they, along with Fordham and Pennsylvania were very useful. But basically, we tried to break the work down so that we would get it done.

The people in my office looked at every opinion of Judge Kennedy. I do not want to say, however, that the people in my office did the kind of analysis that a specialist, say, in the environmental-law field would have done with environmental cases. We did not do it that way.

Senator HATCH. I understand that. You also reviewed opinions where he sat on the panel but did not express a written opinion?

Judge TYLER. Only to a very limited extent.

Senator HATCH. Did you review his speeches and other writings?

Judge TYLER. To the extent we could uncover them, and I think we saw 20 speeches, most of which were—I would call them relatively informal. Those twenty I believe are the same twenty which were delivered to this committee.

Perhaps the most substantive one was the one which has already come up in this hearing, I believe. The one he delivered at Stanford in connection with what I think is called the Stanford-Canadian Program.

Senator HATCH. Well, it is apparent that you have done an exhaustive search, and done an awful lot of work as you do in all of these Supreme Court nominations.

Judge Tyler, during the confirmation hearings on the nomination of Judge Bork, you indicated that action would be taken to prevent breaches of confidentiality by your committee.

Shortly after President Reagan announced his intention to nominate Judge Ginsburg to the Supreme Court, we read commentary in the papers from a member of your committee regarding the problems with that nomination.

Have you attempted to ascertain the source of that breach of confidentiality?

Judge TYLER. I believe I am familiar with the one that—that was not a quotation which, if accurate, was very pleasant.

Senator HATCH. Right.

Judge TYLER. Not just from our internal point of view, but it would certainly, if accurate, give the perception to the public that the speaker had already decided in advance, before we have begun.

Senator HATCH. Right.

Judge TYLER. I can simply say, Senator Hatch, that as a result of that, I called a meeting, had face-to-face conversations with every member of our committee, and some several that could not get there I conferred with separately later, to make it abundantly clear, that aside and apart from our own rule, that only the chairman should respond to press inquiries, that the last thing that any-

body could condone was to have somebody suggest, as a committee member, that he or she had already made up his mind, or her mind, before we even investigated the candidate.

I am happy to say, that as a result, I believe that thought there is the usual dispute as to who said what, I do not think I want to go into that because I think that is unimportant.

We believe that we have—knock on wood—corrected that problem, and that there has been a perception, not only in terms of any particular individual member, but all of us, that this is something where we are duty-bound to continue to struggle to avoid this kind of thing.

I do not want to say that we are perfect—we probably never will be—but I do say that this was–I think at last came home to us all, that whether we like it or not, we have got to be very careful about what we say because it is harmful if we say things like that.

Senator HATCH. Well, I appreciate that. I think that it is crucial that this committee—I mean, you are 15 people who represent hundreds of thousands of lawyers. You are 15 individuals who have your own sets of likes and dislikes, biases and non-biases, and, to the extent that you operate in a totally unbiased way I think you do a terrific job.

And we have seen it through the 11 years I have been here, and I want to compliment you for it. But it is no secret: I was very, very upset about the Bork matter, the way it was handled, the press releases that occurred, the talking to the press, and then to find it happen in Ginsburg just about blew my mind, to be honest with you, and I just have to raise that issue.

But I am not raising it to make your job uncomfortable here today. I just want to make sure that in the future, that that type of breach really does not occur, because to me, that is highly unethical for that to have occurred.

And if there is a member on the committee who still exists there, who did that, I really personally believe that member ought to be removed. But be that as it may, you have satisfied me that you have taken steps, and you are trying to do what is right here, and you will in the future, and there will not be any breaches like this in the future.

Have you given any thought to removing the cloak of anonymity from your proceedings? Now this, I will be frank to tell you, might include making public the credentials and the selection process for committee members, making public the individuals consulted, and making any particular assessment, including informal contacts with friends and political figures, and making public each member's reasons for voting, so that we can really understand that this is a democratic process and not some sort of a secretive process.

Have you given any consideration to that? Because I happen to agree with some of the editorials that have been written, particularly those in the Washington Post, that this would help solve a lot of problems, too.

Judge TYLER. Well, I have to say in all due respect to you, Senator Hatch, and the Washington Post, I firmly disagree. We are, as I said during the course of the hearings in September, a committee, and not just 15 lawyers who are members of some bar association.

As you are well aware, and as my mail continually reminds me, there are individuals in the ABA who do not agree with our committee's work.

Senator HATCH. That is right.

Judge TYLER. And indeed, we do not really speak for the entire membership of the ABA in any event. We are a working committee.

Senator HATCH. That is my point.

Judge TYLER. The operational word is committee, and I, for one, would have resigned summarily if I was just one of 15 people who wandered in here occasionally and gave my personal views on any candidate for appointment to the federal court, because I think it would be a disservice to this committee, the entire Senate, and to the nominating authority.

Who needs me, as an individual, telling this committee what my views are on any candidate? I think that would be monstrously off point.

Second of all, I do not think that I agree with the Washington Post, which has continually said that we never gave any reasons at all, which defies my understanding of the simple language of the report we submitted to this committee in writing, in connection with not only this nomination but the previous nomination.

And third of all, I would point out that we are very hard-working people who have to do our thing as lawyers. We are not full-time public servants. We cannot be exposed in our offices to a camera, or a microscope of every moment, or every conversation we have in doing this work, which I might tell you on the record, consumes at least 400, and often more hours a year, for which we get no compensation at all.

And by the way, in the last 5 months, this committee has processed and reported on more than twice as many nominations to any federal court than in any previous 6 months within recent memory, and that is not to mention the work we did on the nomination of Judge Bork, on the nomination of Judge Ginsburg, and now, the nomination of this candidate.

And I say to you, sir, with great firmness, that I cannot accept, and my committee cannot accept, the constant references that we have been reading about, that we do not tell what we do and that we are operating in secrecy, and therefore in an invidious and unfair manner.

That is a totally baseless, unwarranted accusation, and I cannot understand to this day how this persists. I am perfectly prepared and used to the fact that we will be criticized, depending on what happens.

That has been true in the history of this committee for some 35 years, and we accept that. But to say that we have to have the sunshine laws apply to us, or that we have to individually account, would really turn the whole process, and the work of your committee, sir, on its head.

Senator HATCH. Well, Judge, let me just say this. Excuse me, Mr. Chairman. I just want to make a couple of comments.

I agree with most everything you have said, except the last part, and I have total respect for you, and I think——

Judge TYLER. That is not the point. I understand that.

Senator HATCH. Well, I understand that, but I am just making the point, I have respect for you, and I have chatted with you, and I know that you have tried to do the very best job you can, and it is a very thankless job that you are not paid for, that takes a lot of time that you could be using for many benefits for others.

But let me tell you, in the most firm way I can, too: A lot of us up here were pretty embittered by what happened to Judge Bork, and by the report that occurred with regard to Judge Bork.

And I do not have any problems when the committee completely agrees, unanimously, that a judge is not qualified, or a judge is well-qualified. I do not have any problems with questions. Maybe if he is not qualified, I would, because I think the individual deserves, perhaps, at least a public elucidation as to why he is unqualified rather than just the general statements that normally come out in these hearings.

But let me tell you, when something happens to a judge, like happened to Judge Bork, who 5 years before was given an exceptionally well-qualified rating, and then all of a sudden, 5 years later, after writing better than a 100 opinions that were not reversed, and participating in over 400 that were not reversed, and there were four who—it appears to me, for very partisan, political reasons, did what they did—they ought to have to come in here and explain why they did it.

And I do not care whether they are volunteers in this process, or not. We have to. We are elected, and we face this, and we choose to do this. Well, you do, too.

It just is not fair to these nominees whose whole lives are put on the docket. It just is not fair to them to not have that.

So you and I respectfully disagree on that point, and I will tell you this. If we see another repeat of what happened to Judge Bork, that this Senator is going to do everything in his power to make sure that there will be explanations given in full, fair, and open hearings. Fair to you, fair to the nominee.

And that is regardless of what unpleasantness might occur. I just think it has to be.

Judge TYLER. If I may say so, Senator, I think our difference is not really——

Senator THURMOND. Speak in your microphone. I cannot hear you.

Judge TYLER. Yes. I do not think we are really joining the argument fairly. We are not suggesting, or I am not suggesting that we are being treated unfairly in the sense you have just mentioned. Not at all. We have always been treated courteously.

Senator HATCH. We think so.

Judge TYLER. Where I think our problem is is this: we did our level best to explain why we came out—both the majority and the minority—in respect to Judge Bork. I certainly——

Senator HATCH. You did.

Judge TYLER [continuing]. Do not think that it is fair, therefore, to say that we never explained ourselves. Now it is true, I refused, as you know, to identify who voted which way, and the reasons for that I think I have explained sufficiently for you at least to understand, whether you agree or not.

I think, therefore, what probably is at issue here is, that where we come up and do not come out one way, or the other, unanimously, you seem to feel that that is a difficult problem——

Senator HATCH. It is.

Judge TYLER [continuing]. And I do not quite understand that, because it seems to me, that if we always came out unanimously on everything, you will recall that years ago, this committee was criticized because they always did come out unanimously.

So we are sort of damned if we do, or damned if we do not. I do not understand that argument, frankly.

Senator HATCH. Well, I will tell you why I think it is a good argument. Because I think due process, in these proceedings, literally does require that—yes, you tried to explain what the 15 members had to say, in general, but of course nobody had a chance to hear what the four had to say specifically, and see, that is where the process seemed to break down to me.

And you know, I just think that under those circumstances, the nominee, especially for a position of this type of power and authority, and prestige and capacity, really ought to have the benefit of whether or not there were politics involved, whether or not there was really that good of a consideration involved.

Judge TYLER. You remember, Senator Hatch, that in September, in response to a letter to me as chairperson, from Senator Metzenbaum, I wrote back saying that, look, we, as a committee, known as the ABA standing committee on the federal judiciary, should not be understood to be coming in and making the judgments that the Senate of the United States is empowered to make, and we certainly are not.

That meant, among other things, that we had no right to tell you when we made our recommendation—whatever it was under our standards—that we were here to endorse a position that you would take in your public role that you performed.

Now that being so, I do not see what good it would do—and indeed, I can see a lot of harm that would be done—realizing that we are not a public group, that we suddenly become 15 separate lawyers who, if we should vote one way as opposed to another, would have to come in here and individually explain ourselves.

I think that would make no sense at all, and I do not see how anybody would want to be a member of this committee. I certainly would not.

The CHAIRMAN. Senator——

Senator HATCH. My time has expired.

The CHAIRMAN. I would like to suggest, in light of the fact that it was raised, that the letter dated September 4th, to Senator Metzenbaum from Judge Tyler, and a letter dated August 26th to Judge Tyler from Senator Metzenbaum, be entered in the record at this time.

[Aforementioned letters follow:]

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August 26, 1987

Harold R. Tyler, Jr.
Chairman, Standing Committee on Federal Judiciary
of the American Bar Association
Patterson, Belknap, Webb and Tyler
30 Rockefeller Plaza
New York, New York 10112

Dear Mr. Tyler:

The Senate Committee on the Judiciary will soon consider the nomination of Judge Robert H. Bork to be Associate Justice of the Supreme Court. Because of the importance of the nomination, I believe it is useful to clarify the role of the American Bar Association in reviewing this nomination and in submitting a report to the Committee.

Traditionally, the ABA's Standing Committee on Federal Judiciary has submitted a report on the qualifications of a judicial nominee to the Committee. For example, in the case of the nomination of William Rehnquist to be Chief Justice, the ABA sent a letter dated July 29, 1986, to the Committee and represenatives of the ABA testified before the Committee.

The July 29 letter contains this statement: "Consistent with its long standing tradition, the Committee has not concerned itself with Justice Rehnquist's general political ideology or his views on issues except to the extent that such matters might bear on judicial temperament and integrity." The identical statement was included in the August 5, 1986, letter to the Committee regarding the nomination of Judge Antonin Scalia to be Associate Justice. Both these letters concluded with the statement that the nominees met the ABA standards for "professional competence, judicial temperament and integrity" and were well qualified.

In testifying before the Committee regarding the nomination of Judge Scalia, the representative of the ABA stated: "I think we make it very clear in the second paragraph of our letter that the committee's evaluation of Judge Scalia is based on its investigation of his professional competence, judicial temperament, and integrity. We go on to say consistent with its long standing tradition, the committee's

investigation did not cover Judge Scalia's general political ideology or his views on issues except to the extent that such matters might bear on judicial temperament or integrity." (Hearings before the Judiciary Committee regarding the nomination of Judge Scalia, August 5-6, 1987, pp. 125-6.)

These statements indicate that the ABA Committee's report and findings in the case of judicial nominees, including nominees to the Supreme Court, are limited to issues of professional qualifications, judicial temperament and integrity. The ABA's findings necessarily do not include all issues possibly relevant to confirmation. Thus, the committee does not and could not take a position on the ultimate issue of whether the nominee should be confirmed. Nevertheless, the representative of the American Bar Association in testifying about the nomination of Justice Rehnquist stated that the Committee recommended that the nominee be confirmed. Senator Thurmond asked: "Do you gentlemen of the Committee recommend him to the Senate Judiciary Committee to be approved by this Committee and the Senate?" Mr. Lafitte on behalf of the ABA replied: "That is our recommendation, sir." (See Hearings regarding the nomination of Justice Rehnquist, July 29-August 1, 1987, p. 129.)

Please clarify the position of the American Bar Association as to whether its report and findings are limited to qualifications, judicial temperament and integrity or whether they encompass other issues that may be relevant to confirmation, including the views the nominee holds on basic questions of Constitutional interpretation. Also, please state whether the American Bar Association nevertheless takes a position on the ultimate issue of confirmation.

I would appreciate your reply at your earliest convenience. Thank you for your assistance and cooperation.

Sincerely,

Howard M. Metzenbaum
United States Senator

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September 4, 1987

Honorable Howard M. Metzenbaum
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Metzenbaum:

In response to your letter of August 26, permit me to report that the position of this Committee for many years has been and continues to be essentially as set forth in the last two paragraphs of page 1 of your letter and running over to the top of page 2.

In reviewing the history of the reports to the Senate Judiciary Committee in connection with nominees for the Supreme Court of the United States, it seems clear that in order to best serve the interests of the Senate, this committee has sought, as it should, to focus its reports and findings on the professional qualifications, judicial temperament and integrity of the candidates. Thus, this committee should not address the nominees' political, ideological or philosophical views on specific issues, except to the extent that such matters might bear on the aforesaid questions of judicial temperament or integrity.

Further, it would seem to follow that this committee should not specifically recommend to the Senate how it should vote on confirmation of a given nominee. Parenthetically, I recognize that a report of the committee finding a nominee Well Qualified might be construed by some as equivalent to a firm recommendation to the Senate. Yet, upon sober analysis, since the committee expressly disclaims any opinion upon issues which we assume that the Senate can and does consider, such a broad construction of any finding we might make would not be justified.

I trust this answers the questions posed in your letter of August 26. If not, please let me know.

Very truly yours,

Harold R. Tyler, Jr.

The CHAIRMAN. And Judge Tyler, you think you have a problem with Senator Hatch, that you came in 10–4. If you had come in—or 10–5. If you had come in unanimous against Bork, he really would have been upset.

I yield to the Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman. I will only take a few minutes. I am going to have to leave. The Agriculture committees have two conferences, one on farm credit, and one on the Reconciliation Bill. The latter one is even more important, I would say to my colleagues here, because I understand, from the Majority Leader, depending upon what I and my committee do on that, will affect whether we will recess, or adjourn this weekend, or whether we will go into next week. So I will be urging my other colleagues here to leave to go to that committee conference.

The CHAIRMAN. We urge you to leave, Senator.

Senator LEAHY. Probably the quicker the better.

I would note, because of the comments that went on just in the past few minutes, there seems to be some kind of a feeling here that the ABA sunk the Bork nomination, or advertising groups sunk the Bork nomination, or pressure groups sunk the Bork nomination. That is not so. Judge Bork is the one witness that really counted on the Bork nomination, and it was his testimony—and I think he was candid and honest—but it was his testimony that determined that he was not going to go on the Supreme Court. It was not the testimony of the ABA, or of anybody else.

If you watched the public-opinion polls during that time, and the American public during the time when Judge Bork was testifying, the majority of people stated that they did not want him on the Supreme Court. I have not heard of any Senators who voted either for or against Judge Bork who said they based their decision on anything other than his testimony here.

Now I think the ABA was helpful, and I think you are helpful in all of these. I think you are helpful here today. And the other witnesses for and against Judge Bork were helpful. But ultimately it was his testimony that was the only one that really counted.

So I said at the beginning of these hearings, the same with Judge Kennedy. He is the one indispensible witness, and the one witness that makes or breaks the case. Now many have said that he will be confirmed. If so, it will be because of his testimony. Your testimony is valuable, certainly. It substantiates and buttresses the impressions many have of Judge Kennedy.

Others will testify against him, and that may also speak to concerns that some members of this panel will have. But he really is the one who makes or breaks it. I think all of you would agree with that, that it is the candidate himself, or herself, that affects the final determination. No nefarious group, no cabal, no collective conspiracy sunk the Bork nomination.

After the testimony was heard from Judge Bork, the Senate, with the largest vote against a Supreme Court nominee in history, voted against him, Republicans and Democrats alike. That was not because of some action behind closed doors at the ABA, and it was not because of ads that ran either for or against him, and a lot did. It was because of him himself.

And that is really something we should not lose sight of—that each Senator ultimately has to make the judgment for himself, or herself, on the testimony and the background, and the character, and the judicial philosophy of the candidate. That is what we have always done.

Of course, none of us got to vote on Judge Ginsburg. There, the determination was made by the White House, which sent him a very pointed message to get out, and to his credit he did. But that was not because of the ABA or anybody else.

Now let's not lose sight of the fact that the same thing will happen here; Judge Kennedy will be confirmed, or not confirmed, based on what he has said, his background, his capabilities, and his judicial philosophy.

And let's not put up red herrings, or straw men, to say this is why the administration lost this particular one, or this is why they won this particular one. I do not think the ABA would want to think that they would have some kind of a power, that they could automatically declare who would or would not go on the Court. You do a very valuable service in giving us your information, and I am pleased with that.

You were split on Judge Bork. So was the United States Senate. So were the people of this country. There were people passionately for Judge Bork. There were people passionately against Judge Bork. There were Senators strongly for him, there were Senators strongly against him, and there were people within the administration, on both sides. Is it any wonder that the highly talented, completely competent—and I have every reason to believe—totally honest lawyers on the American Bar Association—would also be split? You know, it is only realistic to expect.

Now I commented as I came in—if you will allow just a second of parochialism—you were mentioning the Vermont law school and their environmental program, and I am delighted to hear you mention that. With the new dean, Doug Costle, I suspect that they will probably even be more strenuously environmental, and I am glad you called on them.

Mr. Chairman, I am sorry to take so long, but I just do not want anybody who is watching this hearing, or watched the last hearing, or listened to it, or read about it, to think that the groups for or against a nominee are here for anything other than to give guidance or to give information to the Senators. But the Senators, each one of us, have to ultimately make up our minds, based on the candidate, himself or herself.

And that really is what decides whether the candidate, himself or herself, will go on the Court or will not. And I think that this committee will be pretty much reflective of the views of the American people. It has in the past, I think it was in the Judge Bork nomination, and I suspect it will be with Judge Kennedy. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you. I hope your conference goes quicker than the statements, so we can all get out of here.

Senator LEAHY. I tried not to take more time than Senator Hatch did.

The CHAIRMAN. You were well within your time and took about a third as much time as Senator Hatch.

Nonetheless, I hope we move this along, and I am sure Judge Tyler enjoys knowing what we think of him, we all love him with great affection, and I imagine he hopes he does not have to be back in this room for another year. The fact of the matter is, Judge, your committee has had the dubious distinction of having to process more judges in a shorter amount of time, of greater controversy and consequence than probably any standing committee the ABA has in the history of the committee.

I think you have done it with great dispatch. I will not speak to it any more. I yield to my colleague from South Carolina who asked to intervene for a moment, and then I am going to make a particular request.

Senator THURMOND. Mr. Chairman, I am going to ask you to excuse me until this afternoon, to attend a funeral in South Carolina. J.P. Strom, the chief of the South Carolina Law Enforcement Division passed away the day before yesterday. He happens to be a cousin of mine as well as a friend, and I will return as soon as I can this afternoon.

Now I just want to say before leaving, on this question of discrimination, that I am bitterly opposed to discrimination.

An organization that deals with issues, and deals with the public, and so forth, is one thing. A purely personal group that wants to meet, whether it is women or men, it seems to me would have a right to meet.

So I just want to pass on to you what I think. I do not think there ought to be any discrimination on account of race or color, sex, religion, or national origin. As I say, I am greatly opposed to it.

A few years ago, Senator Kennedy and I wrote a letter to Judge Bailey Brown opposing invidious discrimination. Invidious discrimination, as I interpret it from the dictionary—and I have a copy of the dictionary here—is harmful or injurious. No rightful person should favor discrimination of that kind.

Now, I do want to say that some time ago we had a judge before us who was a member of the Masons. I took the position that that should not bar him from being a judge. George Washington was a Mason. Many prominent people in the past were Masons. Six members of this committee are Masons. A large number of the members of the Senate and the Congress are Masons. The Majority Leader of the Senate is a Mason, for instance. I do not think anyone should be discriminated against on that account.

Now, some time ago I believe the Federation of Women's Lawyers wrote in. I understand that they do not have any men lawyers. Well, I am looking into that organization to see whether it deals with issues and deals with the public and should be in the category of where there should be no discrimination. But just purely personal, it seems to me, any group of persons could get together in a personal way, that does not have to deal with the public, does not ask for any tax exemption, and does not take an active part that involves the public, I see no reason why they should be discriminated against.

Now, Mr. Chairman, again, I want to thank you, and I will be back as soon as I can.

Judge, I want to thank you and the members of your committee for coming here this morning and the fine report you made. I wish you continued success in what you are doing.

Judge TYLER. Thank you, sir.

The CHAIRMAN. Before you leave, Mr. Chairman, your asking my permission to leave is a little bit like a 300-pound gorilla asking whether or not he can get out of the cage. You can do whatever you want to do, and I am delighted you even ask.

But on a more serious note, let me ask unanimous consent of my colleagues that we go for 2 minutes into executive session for the purpose of passing on some nominees so they can get to the floor and hopefully be confirmed prior to us adjourning.

Senator THURMOND. I certainly favor that, Mr. Chairman, because I have advocated that, and I want to thank you for agreeing to it.

[Recess.]

The CHAIRMAN Our next questioner is the Senator from Wyoming, Senator Simpson.

Senator SIMPSON. Thank you very much, Mr. Chairman. Thank you, too, for moving along those nominations. We will make good progress there, and I know that that is your goal, too.

I wish the Senator from Vermont had stuck around for a minute there. I did not want all that to go uncommented on. Someone will come up to me often and say, "Oh, you are the bald, gray-haired guy from Vermont." And I say, "No. I am not; no, I am not. That is not true." I do not know what they say when he is confronted with that, but Pat and I have some interesting and rich discussions. I enjoy and admire him very much.

I would just say that I would surely challenge what he just said. I believe I said he did not want anybody to know that this had happened the way that people who were Bork supporters said it happened. That is really an extraordinary statement that the candidate himself makes or breaks the case. I would love to believe that. It was indeed not the case with Judge Bork. He was clobbered from seaside, coast to coast, to mountain range in the entire United States in the most grotesque way.

I just wanted to say if Pat had been here, "Bah, humbug," would have been a proper phrase at this time of the year. So I would say it now, because what was really interesting to me, I must share with my colleagues, I received a great deal of mail from around the United States after the Bork hearing. I kept a lot of them that said: Let me tell you something, Simpson. I liked what you did, or I did not like what you did. But I want to tell you, I am a McGovern Democrat or a Kennedy Democrat. I have been a Democrat forever. I will die a Democrat. I did not like Bork. I did not like what he stood for, and I am glad he is not on the Supreme Court. But I am offended and embarrassed at the way it was done. Shocked, saddened and disappointed in my country.

Now, that is what they said. I have got a nice bale of those, and they are moving letters. And I send them to people who write about Bork. Then to go through it on the floor and have some of your colleagues you deeply respect come up to you and say: "Boy, you know, I am embarrassed. I got trapped in August, and I could not get out of the box. I got trapped in September when I was

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home because I read all the stuff and I believed it. I did not know there was that other side, had not heard Jack Danforth speak about this man who was his professor, has not heard these things come up, did not know the intensity of fair-minded people when they got into the blood spore tracking system."

Now, that is the way that was. So I think we want to keep that in perspective if we are going to keep anything in perspective with regard to that. That is why I come back to it. It will not be me coming back to it. They will be teaching that one in constitutional law classes for the rest of the decades about how to do a number on a man's reputation.

Now, that is my view. Everybody has their own. I have never been reluctant to express mine.

Now, I want to thank the American Bar for your very swift work on this nomination. You really did do this one; it must have taken a tremendous effort to get this one to us. You see, the thing is is whether you like it or not, somehow the American Bar has become a bigger player than they should be here. I was a member of the American Bar for many years. You are simply another player in the group, and yet we have given you a status, we have elevated you to a position of some type of omnipotence or something. We do not have a hearing until we know where you are. We do not proceed until we have had the word from the ABA, and I do not think that is right.

I think you must remember that you have a limited role like anyone else in the United States of America. Maybe that is our fault. Maybe we have done that. I think probably it is. But it is a limited role. You know, we look toward you. We love to toast you to the heavens when you support our nominees, and we love to hoot you down when you do not. We have all done that. Do not go back and look at my collected mutterings. You will see, "I think the ABA did a magnificent job with this nominee." Then I will say it the other way when it goes the opposite direction.

But I do have the same concern that was shared previously. I will not belabor it, but it just seems, you know, to kind of crystallize things, how could Robert Bork have deteriorated that much in five-and-a-half years? I mean, how did he go from the toast of the town to the poop of the year? And all the while, all the while, only doing things which were never challenged by the U.S. Supreme Court.

So to come in and then tell us about these marvelous things about political ideology or ideology, whichever term you wish to use and the definition, that it is prohibited there, and then to do that vote on Bork and then to release the figures and then to not believe that that had something to do with this when it was front-page news all over the United States: "ABA Rejects Bork." That is what it said, all over the United States. When you read it and you found out they had not rejected Bork; it was ten to four. But that is the way it came out. The four were unknown to us and still remain so, while we have to trot out all our work in here right under these lights. That is the way it ought to be, and that is the way it ought to be for the ABA the next time. I am going to help assure that it is, because I think it is wrong to give anonymity to some guy who

has got a political idea about a nominee trying to shroud himself in a bunch of stuff.

Now, then another thing that is absolutely fascinating to me, we hear about these clubs and we hear about discrimination. Discrimination against blacks and whites and women and Hispanics and rights and all that. You know something? The U.S. Senate is not bound by any of that stuff. Not a bit of it. We do not practice that ourselves. We go through our day firing people, hiring people. We have congressmen who discriminate against blacks, against whites, against Hispanics, against women. They will never tell you that; they do not have to. They have no legal reason to tell you. We can hire and fire people. They have no employment rights. They have no pension rights. They are just raw meat. That is us. Do not miss who I am talking about. That is 535 of us.

Isn't that fascinating? And yet you hear all this stuff all day long. I do not see any of my colleagues putting in bills to change that. I do not know of any hearings going on to change that. I do not hear any speeches going on to change that. Yet I hear it all day long.

Let me tell you. L[illegible] them up in the other alley is the way we do it here. And they do not have any way to challenge it in any way. Just hit the road, buster. You are done here. You are not working for me any more.

Now, that is the way it is. I think we ought to kind of bring that back occasionally and kind of review it.

Then I am going to throw out the eternal challenge, which may be the death of me. But I am going to stay in the Elks Club, and regardless of how long I stay here, I will remain in the Elks Club. I am going to stay in the Alfalfa Club. I am the vice president now. I have no choice.

That is the way it is. I have not the slightest desire to spent a whit of my life denigrating or belittling women. It is absolutely absurd. I married a lady 33 years ago that was an activist then, an activist now, and is a dazzling person. For heaven's sake, to go through this exercise. * * *

Well, enough of that. Good heavens; it's the Christmas season.

"Anyone that goes about with 'Merry Christmas' on his lips should be boiled in his own pudding with a stake of holly through his heart." I remember that. I shan't do that.

Well, now, that was too much watching Ronald Colman or listening to Ronald Colman in my youth, doing Ebenezer Scrooge.

I just have one question. As you did your work here—and you did good work, and I commend you—it was swift work, and you helped us. You did go through an extraordinary cross-section of human beings in your work. I was very impressed by that.

Would you say that as you came up with this very, I would call it, glowing recommendation of Judge Kennedy that in view of that should not your comments, unanimously held, should not those comments properly alleviate the concerns of some representatives of minorities and women's organizations who believe there is some cause for concern in this nomination? Would you not say that should be a helpful guide to them?

Judge TYLER. Well, Senator, I really cannot answer that. We, as you know, have expressed our views. Whether this will impress

others, I am not sure at all. We can only say what we say on the basis of what we found out.

Senator SIMPSON. I am not arguing that. I am just saying what you say, do you not think that should alleviate the concerns of others who seem to have some feeling that he is going to be tough on minorities' or women's rights?

Judge TYLER. Well, I am not sure who is saying that.

Senator SIMPSON. Well, we have some people that are going to come here and say that.

Judge TYLER. Well, we certainly encountered no evidence that would support that. As we say in our letter, one of the pervasive sentiments that we got in our interviews was that this was a man who was a judge who sticks to the issues and tries to be fair within the limits of his ability and to approach matters without a preordained approach or agenda.

There is no doubt that that is what we learned.

Senator SIMPSON. I know. And in your letter, you said that you had interviewed these various people, and you had also interviewed people and judges who are women or members of minority groups. Did any of them express to you a rich abiding concern about this man?

Judge TYLER. Well, we did not get any submissions that I know of, with the possible exception of a copy of a letter from the National Organization of Women. What we did was interview professionals who happened to be male and female and black and white. There was no breakout on any ethnic, racial or religious lines that we could perceive. This judge was viewed as a person in his career who was, on the whole, very much respected, and it had nothing to do with gender or sex or race at all, as best we could determine from our interview.

Senator SIMPSON. That is what I was inquiring about. It did not arise with this man.

Judge TYLER. Now, that does not mean that some organization does not have the right to disagree with us. Obviously, we can only do what we do.

Senator SIMPSON. Yes, fine. And you did interview sitting Justices and former Justices, did you not? I do not care to know their names.

Judge TYLER. No, no. I do not think we interviewed any former Justices. We interviewed senior appellate judges and I think one or two senior district judges. As far as Justices, we confined ourselves to the present members of the high court.

Senator SIMPSON. Okay, but they were Supreme Court Justices?

Judge TYLER. We interviewed them all, yes, sir.

Senator SIMPSON. All of them?

Judge TYLER. Yes, sir.

Senator SIMPSON. And as I say, I do not want to know the content of those interviews, but apparently there were no concerns that have been expressed to us?

Judge TYLER. That is a fair inference, sir.

Senator SIMPSON. I thank you very much, Judge Tyler.

The CHAIRMAN. Thank you.

The Senator from Alabama, Senator Heflin.

Senator HEFLIN. Judge Tyler——

The CHAIRMAN. Would you unsheathe your microphone, Senator? Thank you.

Senator HEFLIN. Judge Tyler, the American Bar Standing Committee on the Federal Judiciary is a little different in membership from what it was in the consideration of when Judge Bork was before the committee; is that not true?

Judge TYLER. Well, let us see. That is not quite true simply because of the coincidental shifting. Remember, we started——

Senator HEFLIN. A new president comes in—I am seeking to find out if there are members of the American Bar Standing Committee now, who were not members when Judge Bork was considered. Are they all the same?

Judge TYLER. Yes, sir.

Senator HEFLIN. I was under the impression, for example, that Mr. Bob Fiske was on it, and that now Mr. Willis of New York is on the committee.

Judge TYLER. Well, what happened, Senator was this: When we started the work on Judge Bork, as you point out and know, Mr. Fiske was chairperson. Then I took over under the ABA procedures, but we asked Mr. Fiske to come down here with me because he had done so much work on the nomination of Judge Bork.

Senator HEFLIN. I suppose Mr. Andrews probably dealt more with lawyers that had appeared before Judge Kennedy and interviewed those more than any other member of the committee; is that correct?

Mr. ANDREWS. Sir, I interviewed a number of them, but also the members from the New York and East also interviewed a number of lawyers that had appeared before him.

Senator HEFLIN. Most of those were those in the ninth circuit?

Mr. ANDREWS. Yes.

Senator HEFLIN. Now, did you have any assistance or help, or did you do it yourself?

Mr. ANDREWS. There are two representatives from the ninth circuit: Sam Williams out of California, and I am from Seattle. What we do is divide up the ninth circuit because of its size. Sam does most of those around California, and I do the fringes.

Senator HEFLIN. I see. Now, there are a couple of matters that probably are of no real consequence, but maybe I should ask you about it. It appears that there was some complaint by Dr. Hallowell about a lawsuit that challenged the State-wide legislative redistricting and reapportionment made by the California legislature after 1980. I think that she and her husband even charged that there was a conspiracy to thwart their lawsuit and named Judge Kennedy in it.

Would you give us some explanation pertaining to that?

Judge TYLER. Let me answer that one, Senator, because the Hallowells delivered a mound of documents to us very late in our work. It is true that apparently they sent some to Mr. Williams, who unfortunately suffered a stroke several days ago. So we were never able to hear from him on this issue.

However, the papers of the Hallowells—and there are many, many, many. And I use that word three times with good basis in the record. Applications to almost all of the judges on the ninth cir-

cuit were presented to me. I am embarrassed and chagrined to have to report that I read them, and my eyes glazed over early.

The only tactful thing I can say is as follows: First, it is clear to me that the Hallowells did not really appear before Judge Kennedy, as much as they claim they did now. They were before everybody, including Chief Judge Browning. Their arguments were considered ad nauseam by a number of panels.

I am convinced that the notoriety of Judge Kennedy has dictated that they now center their fire on him; whereas, if you analyze their briefs, their petitions, their appeals, Judge Kennedy was a very minor bit player in all of this.

Hence, I did not even think at the last minute—getting all this material—required that I recirculate a vote of all of us. I concluded that I would report to you or anybody else on this committee myself since I had the dubious pleasure of getting all this material and having read it over this past weekend.

The CHAIRMAN. If the Senator will yield for a moment. If I am not mistaken, I have literally a box or more of material relating to this in my office. I believe the gentleman in question was the gentleman who stopped me in the hall yesterday. He was insisting less that I investigate Judge Kennedy than that, as he called it, the corruption of the ninth circuit. It was the ninth circuit, the entire circuit that he was seeking to be investigated. I am not at all surprised, Judge Tyler, your eyes glazed over early.

Judge TYLER. I am putting my reaction, I am afraid, even there tactfully.

Senator HEFLIN. Well, as I said, I thought it was a matter that probably not any great consequence ought to be given to.

There is another matter that causes me slight concern, and that is the matter pertaining to the Van Sickle matter. This largely was reported on the basis of financial income coming in from his representing a woman in a divorce case before he went on the bench on a contingent fee basis. He finally settled it, and there is no question about the finance aspect of it.

This raised some question in my mind because the American Bar's Canons of Ethics indicate that a divorce proceeding should not be taken on a contingent fee basis. Now, those Canons were adopted, I believe, after the divorce case started. I believe it started in 1979. Probably the canons of ethics were adopted after that. It may have been a difference between a disciplinary rule and an ethical consideration. I think whatever was adopted and whatever the American Bar had was after. I do not raise that issue.

But there is some issue, and I would like for you to give some thought to it and maybe give me an answer. As I understood it, at the time California was a community property State. Based on that, is there any ethical issue that you would see under existing rules at the time in 1969 that could cause any problem as to whether it might have been improper to have taken a divorce case on a contingent fee basis?

Judge TYLER. Senator, I am frank to say that this aspect that you are now raising in that matter, I do not believe that we ever addressed. It seemed to us that because of the first point you made that there was nothing wrong here with what happened. So I am afraid that, unless one of my colleagues has an inspiration here, we

will have to respond to you later, because we never focused on this aspect.

Senator HEFLIN. Well, I do not think there was any rule at that particular time. This is in 1969. I have gone back into it and checked it out. My State is not a community property State. But the rationale that has motivated the American Bar now to promulgate a model canon of ethics pertaining to it does raise some issue.

It is quite stale, and I do not really give it a great deal of consideration. But I was interested since the American Bar has promulgated such a rule as to whether or not this is something that you did consider. If so, what would be your feelings on it?

Mr. ELAM. I do not think, Senator Heflin, we did consider that. You are absolutely correct that there is an evolving standard in the ABA as it relates to that subject; namely, that contingency fees are not recommended in divorce matters. I also believe that was clearly subsequent to the time that Judge Kennedy was in private practice.

Senator HEFLIN. I do not think there is any question about that; it is subsequent.

Now, has the report of the American Bar been entered into the record?

The CHAIRMAN. Yes, it has been.

Senator HEFLIN. It has been. All right.

Now, in evaluating Judge Kennedy's nomination, I suppose you discussed the nomination with the sitting judges in the ninth circuit. Mr. Andrews, that is a pretty good number of judges. How many judges are on the ninth circuit now?

Mr. ANDREWS. We are over 20 now.

Senator HEFLIN. Did you discuss with each of them Judge Kennedy and his background, their opinions of him, their feelings about him?

Mr. ANDREWS. Yes, sir. Everyone that was available. I think there were two that we did not get to. We got to every other one.

Senator HEFLIN. You got to all except two?

Mr. ANDREWS. Yes, sir.

Senator HEFLIN. And what was generally your responses from them?

Mr. ANDREWS. In my experience in talking to judges in rating other judges, he received the highest rating and highest acclaim of any judge that I have ever talked to. They had a deep and abiding respect for his sense of justice, for his ability to give everyone a fair hearing, and to make a decision on the facts before him. That came from judges that enjoyed a reputation of being liberal and judges that also enjoyed a reputation of being conservative.

Senator HEFLIN. I have been handed by a member of staff a statement to the effect on the previous question about the model code of professional responsibility, which the ABA adopted in 1969, it served as a basis for professional responsibility in most States. Now, that was in 1969, but it is my understanding that California had not adopted it, and this was as of 1969.

Mr. ANDREWS. That is my understanding.

Senator HEFLIN. So I think that even if it were to be in 1969 that most of the States did not start adopting the model code or modified model codes until several years thereafter. So I do not think it

was controlling. But that issue about community property and the rationale is something that entered my mind. But there was no prohibition even from an ethical consideration. As I understand it, under this model you had disciplinary rules which were outright prohibitions, ethical considerations which were aspirational relative to how a lawyer should carry out his conduct. This being an ethical consideration, an EC, it was not then, even under the American Bar as of that time, binding.

Mr. ANDREWS. That is correct.

Senator HEFLIN. Just to have that accurately stated.

Are any of you from community property states?

Mr. ANDREWS. Yes.

Senator HEFLIN. Is there any more of a rationale which seemingly motivated the American Bar in its promulgation of this rule that would be applicable more to a community property State than it would to a non-community property State?

Mr. ANDREWS. Certainly. The problem of a contingent fee in a divorce proceeding would be much more glaring in a community property state. The ethical problems would be much more severe there.

Mr. ELAM. Senator Heflin, I am reminded, I do not believe California now ever adopted the code of professional responsibility which was recommended by the ABA in 1969.

Senator HEFLIN. Well, I do not think there is any violation of any rule. Of course, even in 1969 it was not a disciplinary rule; it was an ethical consideration known as EC-220. But I just raised the question about the rationale. I do not think, really, that is too important, but it was just an issue that struck me.

That is all.

The CHAIRMAN. Thank you.

Before I yield to my colleague from Iowa, I point out that we are approaching 2 hours, and Christmas. The Senator from Iowa. [Laughter.]

Which is unfair. I did not pick you, Senator. It just struck me now. It was not directed at you. It was directed at myself.

Senator GRASSLEY. You will have a hard time convincing me of that.

The CHAIRMAN. I promise you. Take all the 3 minute you need.

Senator GRASSLEY. Judge Tyler, referring again to the Washington Post article that Senator Hatch previously referred to, and reminding you that on November 4, 1987, six members of this committee sent you a letter about that article—and that letter was signed by Senators Thurmond, Hatch, Simpson, Specter, Humphrey and myself—I would like to quote three paragraphs from that letter.

"The committee member in question"—referring to the committee member of the ABA—"reportedly indicated that"—and I quote—""There are concerns that Ginsburg shares many of the conservative ideological beliefs that doomed the Bork nomination." He or she was further quoted as stating, and I quote again, "It looks to me like we may be going from a Bork to a Bork-let."

Then going on in the letter, "This statement indicates that, contrary to the standing committee's own standards and guidelines, the nominee's ideology will be a major focus of the evaluation. It

also reveals a manifest prejudgment as to the nominee's ideological beliefs before the investigation is ever begun. Moreover, the phrasing used by the anonymous member and the parallels he or she draws to the Bork evaluation give every indication that the member has prejudged the outcome."

Then one last paragraph to quote from. "Aside from the content of the remark, the very fact that they were given to the press is very disturbing. The standing committee's own guidelines and past testimony stressed the critical importance of confidentiality and discretion in the evaluation process, yet the Post story reveals an apparent breach of confidentiality and one highly prejudicial to the nominee at the very outset of the investigation. The impropriety of these prejudicial remarks is underscored by the fact that the member in question was careful to give them under the cloak of anonymity."

Now, I listened to your lecture on the need for confidentiality, but I think that I have got to know whether or not you did find out who that anonymous committee member was.

Judge TYLER. Well, first of all, Senator Grassley——

Senator GRASSLEY. Did you try to find out who the member was?

Judge TYLER. Yes. I do not know why we have to go through this. I answered this when Senator Hatch posed it.

Senator GRASSLEY. You did try to find out?

Judge TYLER. Surely. And I agreed, when Senator Hatch said this, that we had a meeting. Those who could not make the meeting were spoken——

Senator GRASSLEY. Did you discipline the person?

Judge TYLER. I have no power to discipline any——

Senator GRASSLEY. Is the person still on the committee?

Judge TYLER. As I said before, he is. Surely.

I have no power, Senator Grassley, to discipline anybody. You have got to understand that I am not a——

Senator GRASSLEY. You mean the committee cannot take any action when a member of the committee violates its own rules?

Judge TYLER. Senator, I do not and no other one of us appoints people to this committee. That is the prerogative of the president of the ABA.

The fact of the matter is, as I explained to Senator Hatch, this report in the Washington Post was very unpleasant for the reasons that you just quoted in your own letter, and that we endeavored to deal with this; and I believe we have dealt with it as best we could and effectively so within the limit of our powers.

Senator GRASSLEY. Well, if the person has that kind of bias towards a person expressed in——

Judge TYLER. Sir, he may not really. Many of us——

Senator GRASSLEY. How can he serve on the committee and advise us impartially?

Judge TYLER. Senator, he is not doing anything to ill advise you now at all. He is one member of 15 people who have voted unanimously about this candidate.

Also, let us be honest about it. In this world of ours, I have known no person of any rank, status, race, creed, or color that does not suddenly once in a while pop off and say things that he or she later regrets.

You are right if you took these words literally as I have confessed to you a thousand times before you this morning and how many times do I have to do it this morning. He shouldn't, if he said those things, said them for the very reasons you state.

But it ill behooves this committee to keep repeating this, for heaven sakes. How much time can we spend on this any more than we've spent. I don't condone this if it happened the way it was said. Nobody does.

Senator GRASSLEY. I think it's been pointed out very well by Senator Hatch and by Senator Simpson the status that this committee of the ABA is given. There isn't any other trade association in the United States I know of that comes before a congressional committee that has the standing that this ABA Committee has in advising the Senate.

We don't give the testimony of the National Association of Manufacturers or the U.S. Chamber of Commerce or any other trade association the stature we give to the ABA and its ratings of federal judicial nominees.

So that's the difference. You ask me why be concerned about it. That's why I'm concerned about it. That's why I wrote the letter to you.

Judge TYLER. And I answered, and I answered this morning. All I'm saying to you, sir, is why repeat ourselves, and second of all, we're not——

Senator GRASSLEY. Because I listened to a lecture on the need for confidentiality and what I wanted to know is what——

Judge TYLER. And I'm sorry you feel I was lecturing.

Senator GRASSLEY. What did you do about the individual that showed this sort of bias? I would appreciate an answer to my question.

Judge TYLER. I said what happened, Senator, and I don't really think I serve you or anybody else well by repeating it. I do not have the power to appoint. I do not have the power to fire. I am aggrieved as much as you have just pointed out. So are we all.

We're doing our best.

Now, whether or not our views are accredited is not our responsibility. We appear at the request of this committee. If you don't like what we say, you are free to ignore us. I'm sorry.

But I just do not want to continually be put in the position of being accused about this when we can only say what we've already said.

Senator GRASSLEY. It may be irritating, but I'm trying to have a public dialogue with you based on the quasi-public function that the ABA serves.

Let's face it; like it or not, the ABA has taken on a quasi-public function as far as its evaluation of federal judicial nominees is concerned. It should be required to conduct its business according to this status.

Maybe you do not think you serve that sort of function?

Judge TYLER. I agree we do. But what else can we say that has not already been said.

Senator GRASSLEY. Well, let me ask you this. Can the president of the ABA step in and discipline this person for making those biased remarks that were printed in the press?

Judge TYLER. The president of the ABA, I suppose, could step in. But the president of the ABA has not done so, particularly since I've reported to him that we think we have worked this out.

Now, since that episode occurred, since you wrote that letter, since I responded, we have done the things that I said in response to Senator Hatch.

We have done no more; we have done no less. Now, I know that you do not particularly care for us, apparently. But there is nothing I can say about that or do about that, other than what we have already said.

Mr. ELAM. Senator, I would like to add one other thing.

The chairman of this committee, Judge Tyler, gave that matter careful attention. It was a subject of discussion within the committee.

He was extremely concerned, and he totally agreed with the thrust that it is absolutely important that we do have confidentiality, and that there not be any statements made.

So I do not want it left that he's not concerned. He has been intensely concerned and consistent with the other things he has said today.

Senator GRASSLEY. Let me inquire along a little bit different line about the future, and forget about the past.

Let me put it this way. When is the ABA going to start complying with the Federal Advisory Committee Act which requires open public meetings of all advisory committees?

Judge TYLER. Senator, again, that subject was covered earlier in my response. We are not under the coverage of that act. We are private lawyers.

I cannot imagine anybody missing the point here. I do not want to withhold anything.

Senator GRASSLEY. Let me ask you this. With regard to the advice that you give to the Department of Justice——

Judge TYLER. The advice we give to the Department of Justice is very simple and succinct. We do not show them our reports.

And we are people who cannot agree with your apparent view that there is some right on the part of the public to know exactly what I and other committee members do or say in our work in our private offices on judicial investigations. I just do not think that makes sense at all.

And it does not make sense with respect to our appearing here before the Senate.

We are what we are, and you are free to treat us as you see fit. That is the point of my letter this fall to Senator Metzenbaum.

We do not expect we have the right to do what the Senate Judiciary Committee does. You are a legally constituted body; we are not.

You are free to accept or reject our views. Any time on any nomination for any court in the federal system.

Senator GRASSLEY. That is all, Mr. Chairman.

The CHAIRMAN. Judge, what do you think the reaction would be if we concluded, as I guess is implied by some of my colleagues, that we no longer were going to seek the advice of the American Bar Association?

What would be the reaction of the bar? Other than your being momentarily relieved. Seriously. It is a serious question. Because I

assume I am going to be confronted with that as chairman at some point.

Because it is obvious to me you are a private organization. We asked you 35 years ago for the purpose. Everybody forgets the purpose.

The purpose of all this was to keep political cronies from ending up being placed on the bench. So we went to people who—our predecessors went to people who were, and are, highly respected, and said, we want you to give us your best professional opinion about the competence of these people, not their political content, but their professional competence.

And that is why it came into being. It seems kind of funny, we have sort of turned this on its head now. Now we are accusing you of being political—at least that is the inference I draw from some of the questions that are being asked—and when the very purpose was for you to help keep it from being political, which I think you are still doing.

But what would be the response, if in fact, at the American Bar Association's annual meeting, as chairman of this committee, I announced that we are no longer going to seek the advice of any standing committee of the American Bar Association with regard to judges, in the name of Senators Grassley, et al.?

Mr. ANDREWS. Mr. Chairman, let me answer from a practical standpoint, as one of the worker ants out there, and not as chairman of the committee.

I come from the State of Washington, and I do a number of States. A person is nominated. And let us suppose it is a lower court. I go to the judges that that man or woman appears before. That judge has to have confidence in David Andrews that what he or she tells me will be confidential; that what I say will not become public.

The CHAIRMAN. Why?

Mr. ANDREWS. Because that man or woman may well, the next day, be back before that judge. And the system of justice simply won't work that way.

It is doubly true when I am asking that judge to comment on another judge. Will that judge be candid with me and tell me what I need to know if I have to come before you and tell you what Judge So and So told me?

And that is the basis of my opinion.

The CHAIRMAN. The reason I ask the question, I think it is important that, I think we have sort of lost the essence of what this is all about, and what in fact, if it is going to be done, and I admit it is debatable whether or not it should be done; I happen to think it should.

But it seems to me the central issue is whether or not we seek your opinion at all, period.

Once you cross the threshold that we seek your opinion, and we think it has some value, then it is bizarre, it is preposterous, for us to suggest that in fact you become accountable to every public accommodations act or anything else that is out there that in fact requires you to have everything in public.

It is a little bit like an FBI investigation. It is a little like saying that the FBI, that everything will be said and the FBI file will be released.

Some of what you hear is hearsay. Some of what you hear is gossip. Some of what you hear is substantive. And you make a judgment and direct it toward us.

I do not want to belabor it. But really, at some point, I think it warrants, and with good reason—I am not being in any way disrespectful to the point of view of my colleagues. I think we in the committee should debate this, whether or not to have the bar association at all.

Mr. ELAM. Senator Biden——

The CHAIRMAN. I yield to my colleague.

Senator GRASSLEY. The remarks that Mr. Andrews just made about what a lawyer does in regard to reviewing a judicial nominee who he might have to appear before sometime in the future, you know, I've heard this before. It was 30 years ago as a freshman member of the Iowa legislature that I listened to Judge Harvey Uhlenhopp, of the Iowa supreme court and a leader of the reformation of the Iowa judiciary. Incidentally, I think we have a pretty decent judicial system in Iowa.

But Judge Uhlenhopp used that very same argument then. He was comparing the need to change the Iowa system so that it would be more like the federal system, because he said we had to be careful. We could not have judges running for office, with lawyers campaigning for and against each other, because after the election, they might have to appear in the courtroom of the winning candidate someday.

And, for over 30 years, the ABA has reviewed nominees for the federal judicial system—a system that many States like Iowa have emulated. Yet, there is still the "future appearance before the judge" problem, as I see it.

Senator HEFLIN. Mr. Chairman, might I——

The CHAIRMAN. No, I yield to the Senator who has been seeking recognition from Massachusetts, and then we will go to you.

Senator KENNEDY. I know we want to move on.

Senator HEFLIN. Well, I would like to be heard.

The CHAIRMAN. I know you would like to be heard, but he sought recognition first.

Senator HEFLIN. Well, I know, but you said after him you were going to someone else.

The CHAIRMAN. Because he had not had an opportunity to speak yet.

Senator HEFLIN. Well, I am merely trying to comment on this one issue.

The CHAIRMAN. We will do our post-mortem after Senator Specter has completed.

Senator KENNEDY. Mr. Chairman, I appreciate it.

I just want to sound perhaps a discordant note, and commend Judge Tyler and the panel that is here today for the work that they have done on these various nominations.

I think it is a commitment and a dedication to public service that Judge Tyler has been associated with over the course of his life, and which the bar association has also performed.

It is a thankless job. And I think they have done well.

It is interesting, Mr. Chairman, at this point in the course of the hearings on Judge Kennedy that the real controversy is still Judge Bork.

And I think that the American people are beginning to understand it. Because in the course of the two days of hearings, they have seen that Judge Kennedy's America is quite different from Judge Bork's America.

The American Bar Association understood that. This Senate Judiciary Committee understood it. The United States Senate understood it. And America understood it.

And because of that, I believe that the cause of justice in America is better served. In spite of, quite frankly, the sour grapes of some of our friends on the right about a battle that has been long ago fought and decided.

And I just want to express my own appreciation for the work of these witnesses. And I have hope that after Senator Specter has an opportunity to speak, that we can get on with the other witnesses who will speak of the qualification of the nominee who we are charged to evaluate as members of this Senate Judiciary Committee.

I thank the Chair.

The CHAIRMAN. I apologize to the Senator from Pennsylvania for the two interventions. I will go back to the Senator from Alabama upon conclusion of the Senator from Pennsylvania's 15 minutes or less of questioning.

Senator SPECTER. Thank you, Mr. Chairman.

At the outset, I want to agree with both Senator Kennedy and Senator Grassley. [Laughter.]

Senator METZENBAUM. No wonder you got elected.

Senator SPECTER. Speaking as a long standing member of the American Bar Association and as a member of this committee, I do applaud your work.

But I think that Senator Grassley has raised some questions which are very, very important. And I do disagree just slightly with Senator Kennedy. I do not think we are talking about Judge Bork here today on this issue; I think we are talking about Judge Ginsburg on this issue.

Judge Tyler, with all respect, not just due respect, because I have tremendous respect for what you have done in a public service way, and especially what you are doing now pro bono, I do not think that it really advances our interest here to say that it ill behooves the committee to spend more time on the issue of the disclosure by the anonymous ABA member, or to say to Senator Grassley that you cannot imagine anybody missing the point.

I do not believe that on this record the point has yet been established. And I believe, without being unduly repetitious, that it is a very important point. And I took the time to write to you separately back on November 11 concerning this issue.

And I will ask that my letter and your response be made a part of the record at the conclusion of our discussion.

The CHAIRMAN. Without objection, it will be.

Senator SPECTER. And just a couple of lines from my letter. I said, as hard as it is to do, I hope that you will make every effort to

find out if that was actually said, referring to the Post article, and if so, who said it.

If it turns out that a member of the ABA screening committee actually said that, I believe some action should be taken.

I would appreciate knowing what action if any you have taken or do take on checking out the accuracy of that quote from the anonymous source.

And I won't take the time now, Judge Tyler, to read your response. But as I read your response, you did not respond.

When Senator Hatch asked the question of you earlier this morning, you said, as I wrote it down: The usual dispute occurred as to who said what. But in response to Senator Hatch you didn't state whether you had identified the person; what the person said; or what action you took.

Senator Grassley pursued the issue, asking you if you tried to find out. I don't think he ever quite asked you if he did find out, but I do believe that you said you did find out.

And then the question or the comment was made by you that you do not have the authority to appoint, you do not have the authority to fire. And then you did get around to saying that you hadn't asked the president, who had the power to appoint, and presumably the power to fire, what had taken place.

Now, the American Bar Association has enormous standing, and I think it would be a mistake for this committee not to invite your participation, and not to listen carefully to what you say.

And in saying that, I immediately say that it is our responsibility to make the judgment. We listen to what you say, but you have great standing. You have great tradition.

And there will exist a lot of concern, if not a bitterness, about what happened in the previous proceeding.

And to have the comment about a Bork or a Bork-let appear in the paper I think requires that we know what the process is and what you have done about it.

For years, I dealt in a business, as you gentlemen do, of interrogatories, the ad nauseam interrogatories, and the motions to compel more specific answers.

But I believe it is important to know, if it was said, sending us a Bork instead of a Bork-let, if you identified who it was who said it. And I do not ask you for the identity of the person. I am not sure whether you are right or wrong in keeping your minorities secret, but I respect that conclusion, and I think it would not be up to us to say on that.

And I am not asking you to disclose who said it. But I would like to know specifically what was done, either by the chairman, Judge Tyler, or by the committee.

And I think we are entitled to know the specifics so that we can be confident about the processes. And it is more than just taking the generalization that it is all fine for the future.

I think we are entitled to know more details on it.

Judge TYLER. Well, let me start, point by point.

It appears that you think I did not answer all of these things, and I will try.

First of all, with regard to my letter, it is so long ago I have forgotten exactly when I sent it to you. But I do recall that I know more now than I did when I wrote it.

Second of all, I believe that I know the identity of the person.

Third of all, I said what I meant, and I meant what I said, that I have no right to appoint anybody to this committee, or to fire anybody from the committee.

When it appeared that this happened, and I certainly agree with you and Senator Grassley and anyone else that that kind of comment not only violated our rules, but conveyed the impression to any reader, as you point out, and Senator Grassley pointed out, that the person is proceeding with a preordained view before we had even begun to investigate the candidate in question.

And it appeared on a date, by the way, on which that inference was particularly clear cut.

We had a meeting. Not everybody could come, because we have lawyers who have court appearances and so on. Most everybody was there.

We talked it through. We made it very clear that the criticisms that we could contemplate as a result of this were serious; not just because of our own rules, but because of public perception of the work of this committee.

After some struggle, and conversations between me and the individual, that person took the position that the conversation with the press representative took place.

Then we had what I consider, Senator Specter, based on my long career in the executive and judicial branches of the United States, the inevitable problem: A difference as to who said what.

How do you answer that? I have never found there is any sure answer to that.

But we will pass that. I believe, and I reported to the president and through him the president-elect of the ABA that we had done what we could to try and seal off this kind of comment. Again, as I think I have already said, you have to keep in mind that I, at least, have never met a human being, no matter what his position in life, who doesn't occasionally sound off and say things that really he does not quite mean.

I suppose it will come as no surprise to you, with your experience, that the person who I think was involved in this, and certainly admits the conversation with the reporter, may have, you know, lost control and said things that ought not to have been said.

The CHAIRMAN. It has never happened to any of us.

Judge TYLER. I assure you that during the deliberations of our committee, this person was a responsible, careful, and direct investigator, in connection with the nomination of Judge Kennedy.

It would be easy for me to come before this committee with my colleagues today and say, oh, yes, as a result of that Post article, the president of the ABA or the president-elect has stripped that committee member of his post or position.

That is not so easy to do, at least at this point. I certainly agree with you, and I repeat—I thought I made this clear before, but I will repeat it—I am not happy about this. My colleagues are not happy about this.

This has been an enormous cross to bear during one of the busiest times in the history of this committee.

I wish I were a great solver of leak problems. Having been a resident of Washington, DC, I assure you, I doubt that we will ever be leakproof, but we are trying.

What I am trying to convey to Senator Grassley and others is, we come in and offer our opinion. I underscore the word opinion. There is no legal or practical reason why your committee has to accept our opinion as controlling.

I appreciate your concerns, which you are entitled to, about leaks. You are absolutely right. There is no good answer to that that we are proud of, or should be.

But believe me, it is very easy for me who has a lot of things to do everyday, having nothing to do with this committee, to say to this committee, well, you know, we will solve this.

I would be guilty of dissembling at best. But I think at the moment, we are in better shape than we were 5 months ago when I came to this committee, because we have struggled with this.

I assure you that if we cannot solve it now, I am going to go back to not only the president of the ABA, who appointed me by the way, and has the right to fire me, and the president elect.

Because if we have to change how we appoint people to avoid this problem, I for one would like to see it done.

But we are not quite there yet. This has been a high draft, high pressure, time consuming period, since July 1, for this committee.

I do not know if you were here when I reported that in the last 5 months we have done a lot of work. I do not want to boast about that, but I want to make the record clear that we are beset with a lot of work in a confined period of time of great importance to this country.

And to bedevil you or ourselves with these problems any more than we have tried to do has been impossible.

Senator SPECTER. Well, Judge Tyler, I understand what you are saying. I do not expect you to solve problems of leaks.

I do not think that is susceptible to solution in a democratic society, nor should it be. If there is one, all you can do is try to find out, and after you find out, if you have, take what action you consider to be appropriate.

That is all that can be done. Then, to respond to us on those limited questions.

Judge TYLER. And I am sorry I did not know as much when I wrote you as I know now.

Senator SPECTER. Well, you could have supplemented your answers to interrogatories.

Judge TYLER. I could have.

Senator SPECTER. But let us not go over that.

You said a couple of things on which I have just a small bit of follow up.

First you said that you believed you knew the identity. And later——

Judge TYLER. No one has come forward and gotten down on his bony knees or her bony knees and said, I did it.

Senator SPECTER. How about standing up?

Judge TYLER. They have not done it standing up or sitting down.

Senator SPECTER. There is a dispute as to what was said. But you commented, you testified, that a member of the committee admitted to the conversation, to a conversation.

Judge TYLER. That is correct, sir. Admitted to talking to that particular reporter about that——

Senator SPECTER. But disputed the substance of the report?

Judge TYLER. Right.

Senator SPECTER. So you're not sure that that person said Bork and Bork-let, et cetera. You don't have to be.

My only concern, Judge Tyler, is simply that you asked.

Judge TYLER. I surely did.

Senator SPECTER. Okay. You asked all the people who could have been the sources.

Judge TYLER. Right.

Senator SPECTER. And one said, he had a conversation with the reporter, and disputed the context as to what was said.

Judge TYLER. Precisely.

Senator SPECTER. Okay. I do not expect you to make a federal investigation of it beyond that point. And after that was done, you made a judgement that you had found as much of the facts as you could reasonably, and that no further action should be taken beyond the admonition for confidentiality for the future.

Judge TYLER. Well, at the time when this was going on, in between everything else, we had a meeting, that is, the committee. We sat with each other. It was really the only agenda item; this is that serious.

I hoped that by looking each other in the eye, it would finally come home that this is not a game we are playing, and it has very serious repercussions, for the very reasons that you wrote the letter.

We talked to each other. Inevitably, some people could not come. I talked to them, face to face, man to man, woman to man, or whatever.

Now, as a result of that, we got letters, not only from this committee or some of its members, but from other highly reputable people in this country, raising the same point, and legitimately so, once again.

That material was sent around to the committee, not just to the person I am dealing with.

I hope, in short, Senator Specter, that this will solve the problem. As I say, if it does not, then I plan to discuss this matter with the hierarchy of the ABA. Because it is offensive to all of us to have to work in this kind of atmosphere.

I cannot believe there is any doubt about that. It is not pleasant to do this kind of work, only to worry about people leaking or saying things that though they may not have meant them, they are embarrassing to our work and to our appearance before the Senate Judiciary Committee.

Senator SPECTER. Judge Tyler, I thank you for your explanation. I have accomplished my two purposes. One, to find out, to the extent possible, to find out what happened.

And second, I think that the exchanges with the committee today may help you on maintaining confidentiality in the future.

Because when the members of the committee, past and future, see the way this matter is viewed by the committee, and the concern, that we may be of some assistance to you in maintaining confidentiality in the future.

And I think that we should not conduct this inquiry further, and not even consider use of our subpoena power.

Judge TYLER. May I ask a favor of you, sir?

Senator SPECTER. Of course.

Judge TYLER. I noticed that Senator Grassley departed before I could answer your question. Would you convey to him what I said? Because I did not mean to avoid his question, number one, and number two, convey to him that I agree that the letters that he wrote, and the letter you wrote, individually, were a help in this exercise I was just trying to describe.

Senator SPECTER. I think he will be very pleased to hear of your request, and I shall do so man to man. [Laughter.]

[Information follows:]

ARLEN SPECTER
PENNSYLVANIA

COMMITTEES
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS
INTELLIGENCE

United States Senate

WASHINGTON, DC 20510

November 11, 1987

The Honorable Harold R. Tyler, Jr.
Chairman
ABA Standing Committee on Federal Judiciary
1800 M Street, N.W.
Washington, D. C. 20036

Dear Judge Tyler:

While the nominating process for Judge Ginsburg is now moot, I am writing concerning a statement attributed to you and a statement attributed to an anonymous member of the ABA screening committee.

The enclosed article in the Washington Post by Mary Thornton quotes Judiciary Committee sources as saying that you hoped the ABA Committee would finish its investigation of Judge Ginsburg by December 1 but were not sure that it could be completed that quickly.

I would hope that all of us, the ABA and the Judiciary Committee, would move promptly on Judge Kennedy's nomination. I totally agree that we have to do a thorough job, but I believe it should be done as expeditiously as possible. If we do not finish the work on Judge Kennedy promptly but instead let it await action as late as March or April as some have suggested, it may well turn out that there will be no confirmation in 1988 because of presidential politics. That could mean that there would not be a confirmation until the spring of 1989 which would leave the Court without a full complement for two years. That would possibly present a big backlog of cases which would have to be reargued.

I am also very much concerned about the reference to one anonymous member of the ABA screening committee who is referred to in the enclosed Post article as saying that there are concerns that Ginsburg shares many of the conservative ideological beliefs that doomed the Bork nomination and that it looks like we may be going from a Bork to a Borklet. (Hard as it is to do, I hope that you will make every effort to find out if that was actually said; and, if so, who said it. If it turns out that a member of the ABA screening committee actually said that, I believe some action should be taken.

I would appreciate knowing what action, if any, you have taken or do take on checking out the accuracy of that quote from that anonymous source.)

These matters are obviously difficult to handle, and I want you to know that I applaud your continuing pro bono work and the contributions of the ABA screening committee and the American Bar Association generally in this important area.

My best.

Sincerely,

Arlen Specter

P.S. I am sending a copy of this letter to my fellow Philadelphian, Jerry Shestack, because he called objecting to my jointly signing the letter to you from the Judiciary Committee Republicans.

AS:jb

cc: Jerome J. Shestack, Esquire

ABA Evaluation of Ginsburg Is Not Expected Before Dec. 1

By Mary Thornton
Washington Post Staff Writer

The American Bar Association's judicial qualifications committee, expected to play a key role in determining the confirmation chances of Supreme Court nominee Douglas H. Ginsburg, is not expected to complete its rating of him until at least Dec. 1, the Senate Judiciary Committee was told yesterday.

Judiciary Committee sources said Harold R. Tyler of New York, who heads the ABA screening committee, informed Judiciary Chairman Joseph R. Biden Jr. (D-Del.) that he hopes the committee will finish its investigation of Ginsburg by Dec. 1 but is not sure it could be completed that quickly.

The ABA screening committee had played a little-noticed role in the confirmation of Supreme Court justices until last month, when it split on the question of Judge Robert H. Bork, whose nomination to the court was rejected by the Senate last week. Although 10 of the 15 members gave Bork the highest rating of "well qualified," four members described Bork as "not qualified" and one member voted that he was "not opposed" to the nomination.

The same committee had voted unanimously to give "well qualified" ratings to conservative judges, including Antonin Scalia, confirmed to the Supreme Court last fall, and William H. Rehnquist, who was confirmed as chief justice.

The committee may play an even larger role this time because crucial questions will be raised in the Senate about Ginsburg's youth and qualifications. As a 41-year-old former law school professor and government official, he has virtually no experience practicing law and was confirmed to the U.S. appeals court here less than a year ago after the ABA committee gave him its lowest favorable rating of "qualified."

"Given that there's so little on the public record so far, it is especially important that the ABA give close scrutiny to this nominee," said Nan Aron of the Alliance for Justice. "The ABA has been under criticism for not having sufficient backbone and not maintaining high enough standards in reviewing the qualifications of judicial candidates."

Justice Department spokesman Terry H. Eastland said, "Certainly the ABA has its responsibilities in this respect, but I think it should be noted that relative youth should not count against someone. Some of our greatest justices have been in Ginsburg's age range."

Under the ABA committee system, nominees to the district and appeals courts may be rated "exceptionally well qualified," "well qualified," "qualified," and "not qualified."

There are three ratings for Supreme Court nominees. According to the ABA rules, "Well qualified is reserved for those who meet the highest standards of professional competence, judicial temperament and integrity. The persons in this category must be among the best available for appointment to the Supreme Court."

The second category, "not opposed," is for persons who are "minimally qualified," and the third category is "not qualified."

One member of the ABA screening committee, who asked to remain anonymous, said there is some concern over how to deal with the fact that Ginsburg was given a relatively low rating less than a year ago.

The low rating was based at least partially on his inexperience. For eight years Ginsburg taught antitrust law at Harvard Law School until moving to the Justice Department in 1983. He became head of the Antitrust Division in 1985 and was appointed to the court last November. Committee members have refused to say what else may have contributed to the low rating.

"How do you take a person who was found to be just 'qualified' for the court of appeals less than a year ago and find him 'well qualified' for the Supreme Court?" the member of the ABA committee asked. He added that there are concerns that Ginsburg shares many of the conservative ideological beliefs that doomed the Bork nomination: "It looks to me like we may be going from a Bork to a Borklet."

Several members of the committee said they would begin immediately to review Ginsburg's legal opinions and other writings, to interview colleagues and former co-workers and to solicit information from judges, lawyers and bar leaders in each of the judicial circuits.

Irene Emsellem, a spokeswoman for the ABA, added, "They will consult with various interest groups, and they will review whatever is submitted to them."

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November 16, 1987

Honorable Arlen Specter
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

Thank you for yours of November 11.

Taking up the first point you make in respect to the Post article of October 31, that portion stating that Judiciary Committee sources reported that I had hoped that our Committee would finish its work on Judge Douglas H. Ginsburg by December 1, etc., I believe this to have been a substantively accurate summary of what I informed either Senator Biden or Senator Thurmond.

(Turning to the second point to which you refer, and which again is based upon a later portion of the same article in the Post dated October 31, I share your expressed concern. Indeed, I had called a special meeting of this Committee on October 16 with the main item on the agenda to remind everybody that only the Chairman by our rules is entitled to talk to the press. That is a rule which, as far as I know, has been in place for many years so far as this particular Committee is concerned. Nonetheless, we have the problem which you and others have noticed in the October 31 Post article. I wish I could say that we have absolutely resolved the issue of leaks. Unfortunately, painful as it is, I cannot be sure that this is so. Now that I have been Chairman of the Committee for about two months, I have some ideas of what might be done by the ruling authorities of the ABA to assist in this area. Unfortunately, as long as we have the Supreme Court nomination open, I fear I won't be able to get to making these recommendations to the current President and the President-Elect until the process on Judge Anthony Kennedy is completed.)

Finally, I confess I do not understand at all why Jerry Shestack objected to your signing the letter sent to me by your colleagues on the Republican side of the Judiciary Committee.

With kind regards to you and thanks for your continuing interest.

Yours sincerely,

Harold R. Tyler, Jr.

The CHAIRMAN. And they are very close on the issues, so they will have a lot to talk about, too.

Would you like to conclude briefly, Senator?

Senator HEFLIN. Well, I was under the impression that these hearings were about Judge Kennedy.

And we have listened, and there are 12 other witnesses. If there are sufficient reasons to look at this overall situation, I would only suggest that it be done at some other time in order that we might try to finish here on Judge Kennedy before the Christmas recess.

Senator KENNEDY. I second the motion.

The CHAIRMAN. Well, we are finished, I hope. I would like to, and I will put this in writing, Judge Tyler, I will invite you and the president of the ABA, after the 1st of the year, to sit down with me and interested members of the committee to, not to discuss this particular matter, but to discuss the entire relationship.

You need not come. If you do not come, you will never be invited back again, as long as I am chairman. If you come, we can work something out. [Laughter.]

Senator SIMPSON. Mr. Chairman, may I just add, I think that would be an excellent idea. And I would be glad to participate.

The CHAIRMAN. That is not necessary.

Senator SIMPSON. You would not want me not to be there, would you? Is that what you are saying? [Laughter.]

The CHAIRMAN. No, I would love you to be there.

Senator SIMPSON. But I think it is important. I have put 18 years of dues into that outfit, and I have the greatest regard for them.

The CHAIRMAN. I think you have all paid your dues today. I hope you have a happy holiday. Thank you for your contribution. And goodbye.

Now, let me ask my colleagues. It is ten minutes of 12. We have been breaking usually at 12. but we have a number of important witnesses today.

Our next witness is Professor Tribe, who will be testifying. Is it the will of the committee for us to continue, which is my instinct? Or to break at this point?

Senator SIMPSON. Mr. Chairman, our ranking member is not here. But I think we ought to proceed. Just go right on through.

If people want to break for activities, I think that would be the way I would certainly——

The CHAIRMAN. All right, why do we not begin.

And I would suggest to our next witness, a very distinguished former solicitor general, Mr. Griswold, now is the time for him to go to lunch.

I am not being facetious. So we give the witnesses who are behind us some opportunity to plan their schedules also.

Well, Professor Tribe, welcome back. I doubt whether, when you first appeared here, you thought you would be back testifying so soon on a Supreme Court Justice.

Professor Tribe, for the record, as we all know, is a distinguished Harvard Law School professor.

Professor Tribe is the author of a widely used treatise on constitutional law.

And purely coincidentally, I understand that today that second edition is being released on this very day that we meet.

Professor Tribe, welcome. I would like to ask you to stand to please be sworn in.

Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Professor TRIBE. I do.

The CHAIRMAN. Welcome again, Professor. And I will begin the questioning.

You have an opening statement. I realize it is difficult, but we have asked you to limit your statement if you can to 10 minutes, and then we are going to limit the questions by our colleagues to 5 minutes per round.

And we will move on. And we will have as many rounds as Senators feel they need.

So if you will proceed with your statement, Professor. And then I will begin with my questions.

TESTIMONY OF LAURENCE H. TRIBE, PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL

Professor TRIBE. Thank you, Mr. Chairman.

The prepared statement that I have analyzes Judge Kennedy's speeches and his principal judicial opinions. And I do not want to repeat it here.

With the Chair's permission, I will simply submit that for the record.

The CHAIRMAN. The entire statement will be placed in the record.

Professor TRIBE. Thank you. I want to talk more generally about Judge Kennedy's approach before answering whatever questions the committee might have.

From Anthony Kennedy's speeches and opinions and his testimony, there emerges a clear picture. But it is a picture in which a number of people, I think, wish they could see some harder edges, some sharper boundaries, and a more easily defined perspective.

What I find most appealing and promising about the picture that emerges is precisely the absence of any simplistic, single, fixed point of view.

There is, I think, great intelligence and fair-mindedness and commitment to principle; but not unitary vision. Nothing you could put on a bumper sticker.

Now, some of Judge Kennedy's detractors, or some who I should say damn him with faint praise, confuse the absence of simple slogans with a lack of clarity or brilliance. And with all respect, I think they are wrong.

What Judge Kennedy said to Senator Specter yesterday morning is extremely revealing. Let me just quote a few of his words.

He said: "It is somewhat difficult for me to offer myself as one with a complete cosmology of the Constitution. I do not have an overarching theory, a unitary theory of interpretation.

"I am searching for the correct balance."

That seems to me exactly right. I have written that I do not think any "unitary theory" of the Constitution is likely to reflect the complexity or the compromise of that document, or to accommodate evolution in our understanding about it.

Judge Kennedy is really quite eloquent when he testifies about an evolving understanding of the Constitution. In an exchange with Senator Grassley this Monday, Judge Kennedy said, "we can see from history more clearly now, I think, what the framers intended, than if we were sitting back in 1789.

"They had just written a constitution 2 or 3 years ago. They knew the draftsmen. And yet, they were, it seemed to me, more at sea as to what it meant than we were."

Judge Kennedy said, "we have a great benefit in that we have had 200 years of history."

Now, there is no dogmatism, no self assured ideology about that. Instead, there is, I think, the humility that marks the essence of true judicial restraint, and potentially, of genuine judicial greatness.

I take Judge Kennedy seriously when he said, and I quote him, "I think courts have the obligation always to remind themselves of

their own fallibility." But we are not without guidance in his speeches and his opinions and his testimony here as to how he would go about resolving constitutional questions.

Again, he was quite eloquent in addressing that issue on Monday afternoon. He said, and I quote him: "When a judge hears a constitutional case, a judge gets an understanding of the Constitution from many sources: from arguments of counsel, from the nature of the injuries and claims asserted by the particular person; from the reading of the precedents of the court, from the writings of those who have studied the Constitution."

All of these factors, he said, "are, in essence, voices through which the Constitution is being heard."

And the Constitution says some things very loudly and very clearly to Judge Kennedy. Speaking with Senator Specter yesterday about why the specific subjective intentions of the Constitution's framers should not bind the judges of the present, Judge Kennedy said this.

He said, "the whole lesson of our constitutional experience has been that a people could rise above its own injustice, above the inequities that prevail at a particular time.

"The framers of the Constitution * * * knew that they did not live in a constitutionally perfect society, but they promulgated the Constitution anyway. They were willing to be bound by its consequences."

And he said, "I do not think that the 14th amendment was designed to freeze into society all of the inequities that then existed."

"It would serve no purpose," he added, "to have a Constitution which simply enacted the status quo." So that, even though some of the framers were fully aware that they lived in a segregated society, they promulgated grand words by which they were willing to be bound.

Now, I am frank to say that the aspirations to fairness and justice reflected in those words impress me, but that I am troubled by Judge Kennedy's prior memberships in some exclusive clubs.

I see a tension between the aspiration and some of the prior reality.

But I believe that Judge Kennedy has acted honorably; that he should be taken at his word on the subject of discrimination against women and discrimination against minorities; and I find in the opinions that he has written and the speeches and the testimony reason to take him at his word.

Now, those opinions and speeches contain much with which I agree; they leave me with no doubt that there is also some stuff there with which I disagree.

I do not doubt that as a justice, if he is confirmed, he will render decisions with which I sometimes disagree.

But I am left with no doubt that he shares this nation's core commitment to a Constitution that is broad enough and flexible enough to protect basic liberties, including "liberties that may not be spelled out in the fine print," to use a phrase that Senator Metzenbaum used a couple of days ago.

In an exchange on that subject with Senator Leahy, Judge Kennedy said this: "I think the concept of 'liberty' in the due process clause is quite expansive, quite sufficient, to protect the values of

privacy that Americans legitimately think are part of their constitutional heritage."

And when Senator Biden asked, "is there a right to marital privacy protected by the Constitution," Judge Kennedy unhesitatingly replied, "yes."

He does prefer the term, "liberty," but that term is in the Constitution. And of course, it is a capacious and a spacious term.

He adds, though, and I quote him: "Privacy is a most helpful noun in that it seems to sum up rather quickly values that we hold very deeply."

Now, Judge Kennedy fully recognizes, as I think all of us should, that privacy is not an unlimited right. It is a red herring to talk about a boundless, unlimited right of privacy.

Its contours and its limits are debatable. But that process of debate is what the judicial process is all about.

Judge Kennedy said, and I quote him, "with reference to the right of privacy, we are very much in a state of evolution and debate. The Constitution is made for that kind of debate.

The Constitution is not weak because we do not know the answer to a difficult problem. It is strong because we can find that answer through what he called the general and "gradual process of inclusion and exclusion." And he has not left us without some criteria of what he would include and what he would exclude in deciding what the word "liberty" means in our Constitution.

He testified that he would seek "objective referents" for how "essential" something is to "human dignity," how much "anguish" would result if Government were to deny it, how great would be the impact on a person's "ability to manifest his or her own personality," and to obtain "self-fulfillment."

When he was pressed by Senator Grassley, and others, on whether these were not fluid terms, he admitted they were, but he said that is the judicial task, to try to make them objective.

Now, at the same time, Judge Kennedy candidly and fairly testified—and his opinions make clear that he believes this as well—that the Constitution does not empower judges to "create" what, in their personal vision, happens to be "a just society."

It gives courts no mandate to enforce a general "right to happiness." I think he was surely right when he said that most of our material needs, the needs for adequate housing and education, represent a constitutional responsibility of legislatures beyond the power of courts to enforce.

But even there, I was gratified to see that Judge Kennedy understands a limited role for the judiciary. He referred, approvingly, to a Supreme Court decision holding that a State cannot altogether deprive illegal aliens of a free education, and he concluded that "even here, there is an area for courts to participate in."

So I want to stress that sometimes I agree with Judge Kennedy, sometimes I disagree. None of us is entitled to a Justice who mirrors our own legal or political perspectives, or even our own constitutional views. What I think we are entitled to, and what I believe the Senate of the United States has insisted upon in this Bicentennial Year, is a Justice who is deeply committed to an evolving understanding of the Constitution, and to the role of the Supreme

Court in the development of principles that make the Constitution live.

And I believe, from everything that I have read and heard, that Anthony Kennedy would be such a Justice. The fact that he is a conservative rather than a liberal does not prevent me from supporting his confirmation.

[Prepared statement follows:]

TESTIMONY OF LAURENCE H. TRIBE
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF ANTHONY M. KENNEDY
TO BE AN ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT

December 16, 1987

My name is Laurence Tribe. I am the Tyler Professor of Constitutional Law at Harvard Law School. I have taught there since completing a clerkship with Justice Potter Stewart in 1968. I have served as an expert witness on numerous constitutional matters in Congress and have frequently argued in the United States Supreme Court. Among the books and articles I have written is a 1978 treatise entitled American Constitutional Law, the second edition of which has just been published. In 1980, I was elected a Fellow of the American Academy of Arts and Sciences, and my treatise received the Order of the Coif Award for distinguished legal scholarship.

On September 22, 1987, I testified before this Committee on another Supreme Court nomination. It was with regret that I found myself unable, on that occasion, to support the nominee. It is a great honor -- and, on this occasion, a distinct pleasure -- to appear at the Committee's invitation to testify on the nomination of Anthony M. Kennedy as an Associate Justice of the Supreme Court. This time, I am glad to say, I am here to testify in favor of President Reagan's nominee.

I. INTRODUCTION: THE SENATE'S ROLE

In a speech delivered at Columbia Law School in New York City last month, Chief Justice William H. Rehnquist called attention to the role of "the Senate as well as . . . the President" in conducting "inquiry . . . into what may be called the 'judicial philosophy' of a nominee to [the] Court." The Chief Justice expressed the view that such inquiry by the Senate is "entirely consistent with our constitution and serves as a way of reconciling judicial independence with majority rule." I share the Chief Justice's view. Nonetheless I am convinced, for reasons I developed at some length in a 1985 book (God Save This Honorable Court), that the Senate's proper function under the Advice and Consent Clause of Article II, Section 2, does not include enforcing the Senate's own political preferences as between liberalism and conservatism, or as among any other set of "isms". It is one thing for the Senate to reject a nominee whom it perceives, rightly or wrongly, as a threat to the Supreme Court's basic role in our constitutional scheme. It would be another thing entirely if the Senate were to reject a nominee simply because a majority of the Senators would have preferred someone with different views, either more liberal or more conservative, either in general or on some set of specific issues.

Assuming a nominee is otherwise superbly qualified, therefore, the issue for the Senate, as I see it, is not whether

it agrees or disagrees with where the President's Supreme Court nominee stands, or is likely to stand in the future, on such matters as the exclusionary rule, comparable worth, or affirmative action. Today's burning agenda may not be tomorrow's. The issue, rather, is how Senators assess the nominee's commitment to fundamental constitutional principles at the most general level, and how Senators evaluate the nominee's capacity to contribute to the ongoing development and refinement of those principles as a member of our nation's highest court.

My purpose today is to be of whatever help I can to the Senate as it makes that assessment and undertakes that evaluation.

II. EVALUATION OF JUDGE KENNEDY

With this purpose in mind, I have studied all of the speeches Judge Kennedy has made available to this Committee and have read a large number of his judicial opinions. Although I obviously do not agree with everything Judge Kennedy has said or written, and although I fully expect to disagree with some of the opinions he would be likely to write and votes he would be likely to cast as a Supreme Court Justice, it seems to me indisputable that Judge Kennedy's very considerable intellectual strengths are coupled with a deep and abiding commitment to basic constitutional values and principles. There is every reason to expect that, if confirmed as a Justice, Judge Kennedy would make

a significant and enduring contribution to the Supreme Court's crucial work of elaborating, explaining and enforcing the Constitution of the United States.

It is true that Judge Kennedy does not espouse any single, simple theory of constitutional interpretation. This makes his writings harder to characterize than is sometimes the case. But the nominee should not be faulted for having views of a more complex character -- views not susceptible to simplistic labeling. Indeed, in the second edition of my treatise, American Constitutional Law, I address this very matter. On page one of that book, I suggest that little "can be gained by seeking any single, unitary theory for construing the Constitution . . . . For the Constitution is an historically discontinuous composition; it is the product, over time, of a series of not altogether coherent compromises; it mirrors no single vision or philosophy but reflects instead a set of sometimes reinforcing and sometimes conflicting ideals and notions."

A. The Speeches

Judge Kennedy's speeches consistently reflect the highest level of sensitivity to precisely this complexity. In speech after speech -- and in his many years as a professor of constitutional law -- Judge Kennedy has resisted the temptation to offer dogmatic, definitive answers to the most perplexing puzzles of our constitutional order. Speaking of presidential

authority and the separation of powers in Salzburg, Austria, in November 1980, for example, Judge Kennedy explained why answers to some of the most pressing constitutional questions "must await an evolutionary process" and observed that, "as to some fundamental constitutional questions it is best not to insist on definitive answers." In his view -- a view I share -- "[t]he constitutional system works best if there remain twilight zones of uncertainty and tension between the component parts of the government. The surest protection of constitutional rule lies not in definitive announcements of power boundaries but in a mutual respect and deference among all the component parts." (Pg. 11.)

1. On Structural Principles.

In dealing with the structural principles underlying the Constitution, Judge Kennedy's discussions of federalism and states' rights reflect an unusually subtle appreciation for constitutional history and for the perennial tensions and paradoxes of our constitutional system. In a speech on October 15, 1987, in Sacramento, Judge Kennedy called federalism's division of power into two distinct levels of government "[w]ithout question . . . [the] most daring contribution made by the framers to the science of government" -- the "conception that this dual allocation of authority would be protective of freedom." (Pg. 7.) In an address emphasizing the historical background of the concept, delivered on October 26, 1987, before

the Historical Society for the United States District Court for the Northern District of California, he emphasized the "moral and ethical content inherent in federalism" -- the framers' conclusion that it is wrong "for an individual to surrender essential power over his or her own personality to a remote government that he or she cannot control in a direct and practical way." He concluded that "[t]he states, and their subdivisions, with more visible and approachable legislators, and often with an initiative and referendum process, are likely to be more responsiv to the citizen than the federal government." (Pg. 13.)

Yet Judge Kennedy does not let his strong belief in federalism blind him to the difficulties of direct judicial protection of states' rights under our Constitution. In the Historical Society speech, he recognized that "[o]ne of the most intriguing aspects of the Constitution is that it says very little about the power of the states or their place in the federal system," and that "it is difficult to find effective structural mechanisms designed to protect the states." (Pgs. 7-8.) He noted that, when selection of United States Senators by state legislatures was replaced by direct election by the people, the states lost their sole institutional check on the national government, leaving them little ability to fight the national government for turf in the way the three branches of the national government can fight among themselves. (Pg. 8.) As to other guarantees in the Constitution shielding the states from the

national government, Judge Kennedy noted that "[t]he guarantee of a republican form of government and the prohibition against depriving states of equal suffrage in the Senate are there, but nothing more." (Pg. 9.)

Indeed, Judge Kennedy recognized in this speech that "[t]he principal protection for the states is that the national government is one of limited powers." (Pg. 9.) But even this protection has in recent decades exhibited little promise, given developments in how broad those powers are viewed as being. In his 1987 Sacramento speech, Judge Kennedy recognized that, "of all of the structural elements of the Constitution, . . . federalism remains today the most in doubt," given the nationalization of the economy and the growth of national governmental power in both domestic and foreign realms. (Pg. 7.) As a result, Judge Kennedy explained in a February, 1982, speech in Los Angeles, protection of the states is "remitted primarily to the exercise of self-restraint by the political branches." (Pg. 6.) To Judge Kennedy, despite the vital importance of federalism, "[t]here is no easy answer" to the question of how its vitality can be retained. (1987 Historical Society speech, pg. 13.)

Judge Kennedy has also stressed the importance of other structural principles implicit in our system of government -- namely, the separation of powers between the three national branches of government; the checks and balances among the

branches; and, in particular, the power and duty of the judiciary to invalidate unconstitutional actions of the political branches. In his 1987 Sacramento speech, Judge Kennedy defended his emphasis on structural principles by demonstrating that the Constitution's specific protections of individual rights, while obviously crucial, are not by themselves sufficient to preserve liberty. He noted that "there are over 160 constitutions in the world today, many of which contain ringing affirmations of individual liberties, affirmations as eloquent as our own. But absent a structure to guarantee their enforcement, these are shams, what Madision scorned as parchment barriers. Eloquence is easily achieved; freedom and real equality are rare and elusive." (Pg. 9.)

2. On Individual Rights.

As to the Constitution's protections of individual rights as such, Judge Kennedy has made clear his belief in the need for vigorous and open-minded defense of those rights by the federal judiciary. At his induction as a member of the Court of Appeals on June 1, 1975, Judge Kennedy recognized that the Framers of the Constitution drafted "strong words that after all the arguments and interpretations subside, still remain as powerful and forceful shields for individual liberty." (Pg. 5.) His commitment to a strong federal judiciary was highlighted in an August, 1978, speech in Phoenix to his fellow Circuit Judges, in which he attacked a then-pending legislative proposal to

establish a federal judicial commission to police the behavior of federal judges. Regarding such a device as a threat to judicial independence, Judge Kennedy warned that, "once the independence of the judiciary is undermined, it can never be restored." Rather than taking a more measured approach, Judge Kennedy declared that "[t]here is a time to compromise and a time to stand on principle; and I submit we must stand on the principle of judicial independence in this case and refuse to support or endorse or amend this bill." (Pg. 25.)

Defending the record of the independent judiciary in American history, Judge Kennedy observed:

> "I simply must remind you, although it should be clear enough, that it was not the political branches of the government that decided Brown v. Board of Education; and it was not the political branches of the government that wrought the revolution of Baker v. Carr (the reapportionment decision), or that decided the right of counsel case (Gideon v. Wainright). It was the courts. And I submit that if the courts were not independent, those decisions might not have been made, or if made, might not properly have been enforced." (Pg. 31.)

Whether Judge Kennedy was right or wrong in perceiving the proposed judicial commission as a grave threat to the independence of the federal judiciary, it is noteworthy how deeply he cared about the progress that the judiciary had wrought.

Most crucially, Judge Kennedy has recognized that the great protections afforded individual liberty by the Constitution cannot be defined by any scientific process or conception of the

Framers' specific intentions, but are bound up in a continuing examination of the principles of human freedom. In a 1981 commencement speech at the McGeorge School of Law, Judge Kennedy reviewed the concept of "fundamental law," and said that

> "[i]n our own time, the idea is most fully, although not entirely, expressed in the Constitution. The plain fact is that the scholarship of the American legal profession on questions of fundamental law is one of the great contributions to Western civilization in modern times. Our work on this subject is the major source of reliance by every other court in the world that cares about justice." (Pg. 7.)

As understood by Judge Kennedy, the Constitution's fundamental law is plainly an evolving concept. In a speech in Sacramento delivered in February, 1984, Judge Kennedy stated that

> "[c]hange within the mainstream of our constitutional tradition is necessary. . . . The framers of the Constitution would not have used such spacious phrases as due process, cruel and unusual punishment, [or] equal protection of the laws, if they had thought otherwise. The great Chief Justice, John Marshall, said that 'The Constitution was intended to endure for ages to come, and consequently to be adopted to the various crises of human affairs.'" (Pg. 6.)

Judge Kennedy's careful analysis of the broadly phrased constitutional guarantees is best illustrated by his speech at Stanford in July, 1986, on "Unenumerated Rights and the Dictates of Judicial Restraint." Some academics, jurists and others have read the Constitution so narrowly that they are unable to find in it a basis for protecting so-called "unenumerated" rights -- those fundamental personal freedoms which, although not surrendered to any level of government when the people of the United States adopted the Constitution, did not happen to be

specifically mentioned in the Bill of Rights or elsewhere. Such commentators ignore the broad protection of "liberty" under the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as the command of the Ninth Amendment that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Other legal thinkers urge that the expansive phrases of the Constitution be read extraordinarily broadly -- as a means of guaranteeing all the prerequisites of a just society, forgetting the Constitution's character as a sometimes uneasy and unsatisfying product of conflict and compromise.

In his 1986 Stanford speech, Judge Kennedy steered a middle course, arguing that it flouts "constitutional dynamics, and it defies the [precedential] method to announce in a categorical way that there can be no unenumerated rights," but that "it is imprudent as well to say that there are broadly defined categories of unenumerated rights, and to say so apart from the factual premises of decided cases. This follows from the dictates of judicial restraint." (Pg. 5.)

In this spirit, Judge Kennedy, through a discussion of the rights to travel and to vote, and the right of privacy, explored in some detail and with considerable subtlety "the boundaries of judicial power and the difficulties encountered in defining fundamental protection[s] that do not have a readily discernible basis in the constitutional text," (pg. 1) demonstrating his

preference for detailed attention to the factual nuances of particular situations, with close heed to the Constitution's text, structure, and history, and to the traditions surrounding its evolving interpretation. In Judge Kennedy's view, this process is most in line with the judicial role of deciding "specific cases, from which general propositions later evolve, and this approach is the surest safeguard of liberty." (Pgs. 4-5.)

Judge Kennedy's analysis of the "right of privacy" decisions protecting fundamental matters of family life and individual autonomy and intimacy is particularly perceptive. That these specific words do not appear in the Constitution, he suggests, is a distraction. Some of the most difficult constitutional controversies involved in this area, he points out, would persist even if the Constitution's text were explicitly to grant a "right to respect for private and family life," as is afforded under European law. (Pg. 9.) Judges would still have to struggle with intractable problems of defining and delimiting this right's outer boundaries. And some of the confusion in this area, he suggests, stems from use of "the word 'privacy,' rather than . . . a constitutional term, such as 'liberty'" -- shifting attention to "[t]he mystic attraction of [an] untested and undefined word . . . ." (Pg. 10.)

The difficult questions in addressing such divisive constitutional issues are, therefore, ones that at times not even

the most explicit text can answer. Yet Judge Kennedy recognizes the federal judiciary's obligation to examine these issues:

> "The fact that we are not sure how ultimate legal principles are weighed in reconciling conflicting claims between society and individual freedom, or that we may disagree on the subject, does not mean that our duty to address such questions can be abandoned or treated with indifference. . . . [I]t is the nature of the judicial process that ultimate principles unfold gradually and over time." (1981 McGeorge speech, pg. 7.)

Judge Kennedy has made it equally clear, however, that the Constitution is not an instrument for the enshrinement of judges' own political or moral values. In his 1986 Stanford speech, Judge Kennedy admitted that "[o]ne can conclude that certain essential, or fundamental, rights should exist in any just society," but that "[i]t does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution." (Pg. 13.) At a speech delivered in Sacramento during February, 1984, he noted that "[t]o recognize the necessity of continued interpretation does not give us a license to interpret the document for utilitarian ends," and that "[t]he Constitution cannot be thrown about as a panacea for every social ill" -- "cannot be divorced from its logic and its language, the intention of its framers, the precedents of the law, and the shared traditions and historic values of our people." (Pg. 7.) In this way, Judge Kennedy properly stressed the very considerable differences between identifying the rights implicit in our Constitution and deciding what rights ought to exist in an ideally just society.

Given the limits of judicial interpretation, Judge Kennedy quite rightly has pointed out that many claims "that courts must enforce certain minimum entitlements" requiring positive action by government, such as "education, nutrition, and housing . . . if the constitutional system is to work," appear implausible under our Constitution as written. One may argue, he noted, "that the political branch has a responsibility to furnish an entitlement that is necessary to make the constitutional system work, but this simply underscores the proposition that the legislature has the authority to initiate actions that the judiciary does not." (1986 Stanford speech, pgs. 17-18.) The alternative of federal courts instructing government "what minimum level of entitlements each citizen must receive . . . would be a fundamental change of our constitutional tradition," and "a further erosion of the sovereignty of separate states." (1984 Sacramento speech, pgs. 5-6.) Judge Kennedy therefore recognizes that the legislative branches may have constitutional responsibilities to furnish the entitlements needed to make the system work even when those responsibilities are not fully and perfectly enforceable by courts of law. This view -- one that a number of scholars have defended -- stands in sharp contrast with a doctrinaire commitment to judicial enforcement of every right that our Constitution might be said to support.

It would be wrong to suggest, said Judge Kennedy in a 1982 Los Angeles speech, that "the judiciary is the sole force for the preservation of constitutional values . . . ." Indeed, he

recognizes that "the Constitution in some of its most critical aspects is what the political branches of the government have made it, whether the judiciary approves or not," and that "Congress must acknowledge its constitutional responsibility and begin to articulate its legislative judgments in constitutional terms." (Pg. 9.) In his 1986 Stanford speech, Judge Kennedy elaborated on this theme: "If there are claims of basic rights . . . not cognizable by the courts, claims that must be honored if the Constitution is to have its fullest meaning, the political parts of the government ought to address them" so those branches are held accountable; a degree of judicial restraint in addressing such matters ensures that the political branches will not "deem themselves excused from addressing constitutional imperatives . . . ." (Pg. 21.) Judge Kennedy is not concerned "that there is a zone of ambiguity, even one of tension, between the courts and the political branches over the appropriate bounds of governmental power," believing that "[u]ncertainty is itself a restraint on the political branch, causing it to act with deliberation and with conscious reference to constitutional principles." (Pg. 22.)

These views do not derive from Judge Kennedy's personal views about the nature of good judging. Rather, Judge Kennedy believes that "[t]he imperatives of judicial restraint spring from the Constitution itself," a document "written with care and deliberation, not by accident," and that restraint by judges is part of our structural system of checks and balances. (Pg. 20.)

Principled limits on judicial power are necessary, Judge Kennedy argued in his 1987 Sacramento speech, because "judges are in the fortunate, or unfortunate, position of making up the rules in [their] own game"; they must therefore avoid both the fact and the perception that they hold "uncontrolled authority lead[ing] to the raw exercise of will, the . . . insolence of office." (Pg. 6.)

3. Assessment.

In remarks to the Ninth Circuit Judicial Conference in August, 1987, Judge Kennedy referred to the notion of an unwritten Constitution, stressing its embodiment of cultural and ethical constraints that limit government in general, including the federal judiciary. He believes that this notion "counsels the morality of restraint," and "teaches that any branch of the government which attempts to exercise its powers to the full, literal extent of the language of the Constitution is both indecorous and destabilizing to the constitutional order." (Pgs. 5-6.)

Some critics of these observations -- and of the measured tone of Judge Kennedy's speeches generally -- have read in them a distressing signal of reluctance to invoke judicial power boldly to vindicate unconventional or unpopular claims against the will of a determined majority. A candid assessment requires one to concede that there is a risk that the thoughtful generalities

contained in Judge Kennedy's speeches could serve as excuses for an insufficiently vigilant judicial role. But it seems fundamentally improper to read Judge Kennedy's speeches in their entirety as presenting any such threat. There is no ground for drawing sinister inferences from language which seems entirely responsible and which does not suggest an agenda to diminish the established role of the federal judiciary in protecting individual rights.

It is perhaps ironic that a principal criticism of Judge Kennedy, from both ends of the ideological spectrum, has focused on his supposed tendency to accept legal doctrine as pronounced by the Supreme Court -- a tendency that some criticize as insensitive to claims of freedom and equality, and that others criticize as insufficiently protective of the majority's prerogatives. Thus, I have heard him attacked both from the right for his failure to criticize the Supreme Court's controversial 1973 abortion decision, and from the left for his failure to criticize the Court's 1986 decision limiting the rights of sexual privacy.

I find neither attack fair or persuasive. As a sitting federal judge, Anthony Kennedy might have felt less free to criticize than others would. Or perhaps it is simply not his style to tilt too hard against prevailing legal winds. But what I have read of Judge Kennedy's work belies any notion that he lacks the independence of mind or the critical edge that would

enable him to bring his powerful intellect and his evident sense of fairness to bear upon the novel challenges that would confront him as a Supreme Court Justice.

Nor should the intellectual quality of Judge Kennedy's work be underestimated. It might be easier to perceive brilliance in constitutional arguments that stake out bold, extreme positions -- in speeches and essays (or, for that matter, opinions) that simplify for the sake of emphasis or clarity. But it would be a great mistake in Judge Kennedy's case to attribute the cautious and measured character of his analyses to any lack of intellectual force, lucidity of mind, or conviction. The caution that characterizes Judge Kennedy's speeches reflects not a mind lacking in boldness but a temperment resistant to oversimplification. In sum, Judge Kennedy's speeches reward close attention precisely because they reveal an admirably complex and balanced understanding of constitutional problems.

B. The Judicial Opinions

In light of these qualities of mind, it should not be too surprising that Judge Kennedy's views, as reflected in his Court of Appeals opinions, resist easy categorization.

Judge Kennedy's opinions on the Court of Appeals -- consistent with the views he has expressed in his unpublished speeches -- demonstrate a sensitive approach to the problems of constitutional interpretation. Ultimately, Judge Kennedy's

opinions reveal a belief in the fundamental constitutional principles that have been of concern to this Committee. In particular, they demonstrate the absence of any categorical opposition to a view of the Constitution as an organic, evolving document; dedication to the fundamental role of the courts in our constitutional system as protectors of individuals and minorities from oppressive government; and a commitment to the special place of courts in elaborating and enforcing principles implicit in the Constitution's structure, even when those principles may not be explicitly stated within the four corners of the document.

Judge Kennedy has limited his holdings quite closely to the facts of the case before him, avoiding the broad, inevitably oversimplified pronouncements of the dogmatist. In this he reminds me of the late Justice Stewart, for whom I clerked in 1967 and of whom I wrote in a tribute: "He was less interested in pursuing a unified philosophical vision than in determining what the law, as he understood it, required in the case at hand." Tribe, Justice Stewart: A Tale of Two Portraits, 95 Yale L.J. 1328, 1328 (1986). Judge Kennedy espouses no all-inclusive constitutional theory, and his opinions reflect a cautious, thoughtful, case-by-case approach to judicial decisionmaking. The "judicial restraint" revealed in his opinions is the restraint that avoids categorical answers to complex issues whose resolution requires subtlety and flexibility.

1. A Belief in Implicit and Evolving Constitutional Principles.

Judge Kennedy's opinions are illustrative of his willingness to draw inferences from the broader principles underlying the Constitution's text. His decisions concerning the right to privacy, for example, reveal a cautious acceptance of certain constitutionally protected unenumerated rights.

In Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied sub nom. Beller v. Lehman, 452 U.S. 905 (1981), for example, Judge Kennedy ruled that the constitutional right to privacy did not protect naval personnel from discharge for homosexual conduct. While I am inclined to disagree with Judge Kennedy's conclusion, there can be little doubt that the Supreme Court as then composed would have reached the same result he did. Indeed, the Court subsequently upheld the power of state governments to go so far as to impose criminal penalties on private, consensual homosexual conduct in Bowers v. Hardwick, 106 S. Ct. 2841 (1986) -- a case that I argued in support of the privacy claim.

In Middendorf, Judge Kennedy did not conclude that the consensual conduct at issue was constitutionally unprotected, but that the needs of the military outweighed whatever solicitude such conduct was due. Judge Kennedy's ultimate conclusion -- that the right to privacy must yield in some circumstances -- is surely defensible. Indeed, even the brief I submitted in Hardwick invited a distinction between crimininalizing consensual

intimacies and subjecting them to less intrusive forms of regulation. The language of Judge Kennedy's opinion evidences recognition of the courts' role in the protection of certain unenumerated rights grounded in historical understandings or inferrable from the structure of the Constitution.

The Middendorf opinion also demonstrates the type of cautious restraint characteristic of Judge Kennedy's judicial philosophy. In Middendorf Judge Kennedy decided only the question before him -- the permissibility of military discharge for homosexual conduct -- leaving open the question of privacy in other contexts until a case concretely presenting the issue might come before the court. At a time when other judges -- in the name of judicial "restraint" -- were shutting the door to future litigation of related issues of individual liberty, Judge Kennedy properly went out of his way to avoid such judicial activism.

United States v. Penn, 647 F.2d 876 (9th Cir.), cert. denied, 449 U.S. 903 (1980), reveals the extent of Judge Kennedy's commitment to constitutional protection for fundamental rights involving privacy and the family. In Penn, Judge Kennedy dissented when the Court of Appeals upheld the legality of a five-dollar police bribe to a five-year-old child -- offered to the child in his parents' absence -- to obtain evidence to be used against his mother. Judge Kennedy would have excluded the evidence that the bribed child had shown to the police. Most significantly, he based his ruling on more than the ad hoc

conclusion, relied on by the district court, that the police behavior was so "shocking to the conscience" as to violate due process. See id. at 879 (citing Rochin v. California, 342 U.S. 165 (1952) (per Frankfurter, J.)). Rather, Judge Kennedy viewed the governmental intrusion into the parent-child relationship as violative of the broad principles animating such Supreme Court privacy decisions as Moore v. City of East Cleveland, 431 U.S. 494 (1977), and Pierce v. Society of Sisters, 268 U.S. 510 (1925). While others have attacked the Supreme Court's privacy decisions as "unprincipled," Judge Kennedy's ability to apply those decisions in a principled way to a new situation demonstrates a genuine commitment to the idea of a living Constitution.

Nor is Judge Kennedy's commitment to the Constitution as a set of principles going beyond the explicit textual provisions limited to the elaboration of unenumerated personal rights. It extends as well to discerning structural limits in the constitutional system of checks and balances which is, in the end, one of the fundamental guarantors of individual liberty. In Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), aff'd sub nom. INS v. Chadha, 462 U.S. 919 (1983), Judge Kennedy foreshadowed the Supreme Court's landmark invalidation of the legislative veto, see INS v. Chadha, 462 U.S. 919 (1983), reasoning that to place the disapproval power in the hands of one house of the legislature threatens the tyranny of concentrated power that the separation of powers was designed to prevent. In so holding,

Judge Kennedy relied not only on the intentions of the Framers, but also on principles inherent in the system of government they created. Judge Kennedy's Chadha opinion confronted the complexities of the legislative veto even more forthrightly than did the Supreme Court; indeed, many commentators, I among them, have found Judge Kennedy's opinion in Chadha to be more subtle and insightful than the opinion for the Court written by Chief Justice Burger, demonstrating a thoughtful -- even scholarly -- approach to the Constitution's most fundamental architectural principles.

The Chadha opinion, too, reveals again what might be called Judge Kennedy's most consistent philosophy. He himself has described the aspect of the case to which I refer, in the Hoover Lecture delivered at Stanford in May, 1984: "In our court we left open the possibility of further analysis or doctrinal elaboration by confining the opinion to the case before us. This was implied acknowledgement that some forms of legislative veto might survive." (Pg. 1.)

2. A Positive Commitment to the Judicial Role.

Rather than uniformly evidencing only a grudging acceptance of the judicial role in elaborating and enforcing fundamental constitutional principles, Judge Kennedy's opinions often display a powerful affirmative commitment to judicial protection of liberty and equality. He has at times sought positively to

extend protections of these fundamental rights beyond the point undeniably compelled by Supreme Court precedent.

Perhaps the most prominent example is Judge Kennedy's opinion in James v. Ball, 613 F.2d 180 (9th Cir. 1979), rev'd sub nom. Ball v. James, 451 U.S. 355 (1981). Six years before James, the Supreme Court, by a divided vote, had qualified its basic commitment to the "one person-one vote" principle with a dubious notion that a "one acre-one vote" allocation of electoral power is permissible for a governmental body that has a "special limited purpose," if its activities have a "disproportionate effect . . . on landowners as a group . . . ." Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 728 (1973).

Sensing the tension between this decision and the promise of equal participation explicit in Baker v. Carr, 369 U.S. 186 (1962), and its earlier progeny, Judge Kennedy refused to extend the approach of Salyer to the Arizona Agricultural Improvement and Power District -- a governmental entity that provided utilities and water services to many of the citizens of Arizona, landowners and non-landowners alike -- and held unconstitutional an electoral system in which the franchise was restricted to landowners, with voting power essentially apportioned on the basis of the amount of land owned.

Unfortunately, only four Supreme Court Justices were persuaded by Judge Kennedy's reasoning. A 5-4 Court reversed

James v. Ball, and retreated further from the principle of one person-one vote. See Ball v. James, 451 U.S. 355 (1981). In dissent, Justice White, joined by Justices Brennan, Marshall and Blackmun, quoted at some length from Judge Kennedy's opinion, sharing his conclusion that "'it would elevate form over substance to characterize the District as functioning solely for the benefit of the landowners.'" 451 U.S. at 383-84 (quoting 613 F.2d at 184).

Similarly, in CBS, Inc. v. United States District Court, 765 F.2d 823 (9th Cir. 1985), Judge Kennedy extended the First Amendment right of access to criminal proceedings -- a right first recognized in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) -- to the post-conviction context, and to a right of documentary access. CBS sought access in this case to a sealed motion for a reduced sentence submitted by a defendant as part of a plea bargain in which he agreed to testify against automobile executive John DeLorean, then on trial for narcotics offenses. Judge Kennedy held that "[t]he primary justifications for access to criminal proceedings . . . apply with as much force to post-conviction proceedings as to the trial itself," 765 F.2d at 825, and ordered the district court to unseal both the defendant's motion and the government's response. His decision thus expanded the scope of the government's affirmative duty to provide access to information in order to make meaningful the liberty implicitly guaranteed by the First Amendment.

Even in cases where Judge Kennedy might be faulted for having afforded insufficient judicial protection to minorities, his opinions display a willingness to suggest other possible avenues for judicial relief. In Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980), for example, Judge Kennedy was faced with a challenge to San Fernando, California's at-large voting system. A group of Mexican-Americans alleged that the electoral scheme was intended to discriminate against them. In a separate concurring opinion, after reluctantly finding the evidence insufficient to create an inference of intentional discrmination in the creation or maintenance of the entire at-large voting system -- a decision with which I disagree -- Judge Kennedy went on to suggest that some of the evidence presented might justify other types of judicial relief, including "a remedial requirement of increased consideration and/or appointment of Mexican-Americans" to San Fernando's city commissions, on which Mexican-Americans had been historically underrepresented. 600 F.2d at 1279. Thus Judge Kennedy went out of his way to suggest alternative possibilities to the litigants against whom he ruled.

3. Willingness to Absolve Government of Responsibility.

None of this is to say that Judge Kennedy could plausibly be described as a judicial "liberal." He has, for example, been quick at times to absolve government of responsibility for its complicity in inequality arising from the marketplace in

employment and housing. In his famous opinion in AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), Judge Kennedy wrote the nation's leading opinion rejecting the comparable worth theory of gender-based wage discrimination. He held that the employees of the State of Washington, in job categories at least seventy percent female, could make out neither a disparate impact nor a disparate treatment claim under Title VII based upon inequality of pay for comparable work. Writing that "[n]either law nor logic deems the free market system a suspect enterprise," Judge Kennedy concluded that "the State did not create the market disparity and has not been shown to have been motivated by impermissible sex-based considerations in setting salaries." 770 F.2d at 406-07. While it seems likely that the Supreme Court would have reached the same conclusion, Judge Kennedy was perhaps too quick to conclude that the state bore no responsibility for deciding in its own practices to mirror the "private" wrong of a structural, gender-based wage disparity.

In Spangler v. Pasadena City Board of Education, 611 F.2d 1239, 1242 (9th Cir. 1979) (Kennedy, J., concurring), following the Supreme Court's lead, Judge Kennedy concluded that a court should not retain jurisdiction over a school desegregation action where the school board had substantially complied with a court order designed to remove the vestiges of past discrimination even where the result -- because of such "private" wrongs as segregated neighborhoods -- will almost certainly be schools as segregated as they were prior to the court-ordered desegregation

plan. While Judge Kennedy's opinion was consistent with Supreme Court precedent, see Spangler v. Pasadena City Board of Education, 427 U.S. 424 (1976), a more sensitive approach might have recognized that even such "natural" and "private" factors as residential choices that cause discriminatory racial consequences may themselves be products of prior official policies and public programs. A deeper commitment to the elimination, "root and branch," Green v. County School Board, 391 U.S. 430, 438 (1968), of racial separation in our public schools requires complex -- and continuing -- judicial remedies, even reaching at times into the field of racially segregated housing. Indeed, the rigid compartmentalization of state action that underlies the Court's desegregation remedy decisions is reflected daily in the continuing racial segregation in our schools, exposing the sadly unkept promise of Brown.

In the latter regard, Judge Kennedy's reading of § 3612 of the Fair Housing Act, 42 U.S.C. § 3612, in TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976), was strikingly restrictive of the class of people to whom the Act granted standing to sue. TOPIC, an integrated organization dedicated to eliminating racial discrimination in housing, had discovered -- through use of black and white couples posing as home seekers -- realtors engaging in racially based "steering," that is, directing of black customers to homes in predominantly black residential areas. Judge Kennedy ruled that this section of the Act did not permit suits to vindicate the rights of third parties, and that only a narrow

class of "direct victims" of housing discrimination -- persons directly faced with discriminatory practices -- were "granted rights" under the Act. Judge Kennedy's decision would effectively have limited the right to sue under § 3612 to this small group of "direct victims."

This conclusion seems particularly hard to defend in light of the Supreme Court's prior holding that "[a]ny person who claims to have been injured by a discriminatory housing practice" -- language contained in another section of the Fair Housing Act -- includes a renter or homeowner denied by discriminatory practices against others "the important benefits from interracial associations." Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210 (1972). Judge Kennedy sought to distinguish the harms of residential segregation suffered by TOPIC members as "caused by no specific single act of the defendants, but by a prolonged practice spanning many years" -- and thus somehow as less worthy of immediate judicial redress. That distinction is unpersuasive. I think it fortunate that the Supreme Court -- by a vote of 7-2 in an opinion written for the Court by Justice Powell -- disapproved of TOPIC in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

It must be conceded that more than a few individuals and groups have found something to criticize in decisions such as these; some of the criticism seems to me well founded. But no nominee may be required to be free from error. And nothing in

Judge Kennedy's judicial performance suggests that he should not be confirmed, for nothing in it overcomes the overall picture, presented by his speeches and opinions taken as a whole, of Judge Kennedy as a sensitive and powerful proponent of judicial vindication of basic rights -- and as an intelligent and fair judge. None of his judicial work evidences the antipathy to fundamental constitutional principles that might bring into question his suitability as a nominee to the Supreme Court.

On the contrary, Anthony Kennedy's public service as a Circuit Judge, like his scholarly work, evidences qualities of mind and spirit that well suit him to distinguished service on any court. His is not a nomination that challenges the role that the post-World War II Supreme Court has come to play in defending constitutional principles of liberty and equality, within a system of separated and divided powers. On the the contrary, his nomination is entirely consistent with that evolving role.

III. CONCLUSIONS

When all is said and done, Judge Kennedy is, in most senses of the word, a "conservative." But it is not a play on words to say that there is much worth conserving in our constitutional tradition. And, in any event, the role our Constitution assigns to federal judges is in some respects inescapably a "conservative" one. Such judges are, after all, bound by a legal tradition that leaves them free to make significant choices --

but only within a fairly significant set of constraints. Within these constraints, some would prefer a jurist with more "liberal" leanings than Judge Kennedy is likely to display. But liberals are not entitled to demand that of the President. The Senate should not withhold its consent from a nomination that honors and seems likely to advance, rather than jeopardize, our core constitutional traditions even if some Senators would have favored a differently inclined Justice.

There is good reason to believe that Anthony Kennedy would serve with distinction, and would work to preserve and protect basic constitutional values, if confirmed as a Justice of the Supreme Court. And, assuming these hearings contain no surprises, there is no good reason to believe that his approach to the Constitution, or to the Court's role in enforcing it, would threaten either our fundamental law or the judicial function. Thus I urge the Senate Judiciary Committee to report favorably the nomination of Judge Kennedy to the full Senate, which I hope will promptly confirm his appointment as an Associate Justice of the Supreme Court.

The CHAIRMAN. Thank you, Professor. As I said, I have some prepared questions. I may submit them to you in writing, but I have one question at the top here.

I read with some interest yesterday, an editorial saying that Kennedy was the same as Bork. His views on unenumerated rights were no different than Judge Bork's. Some of my colleagues have suggested that.

How can you say, as you have here, that he is different? Summarize for me, if you can in a minute or so, so I will have a chance to ask you another question, in what fundamental sense is his view on unenumerated rights different than Judge Bork's?

Professor TRIBE. Well, I guess, Mr. Chairman, he put it rather well himself. Judge Kennedy said that, rather than talk about "unenumerated rights"—he does not like that phrase a lot either—we are simply talking about how far "liberty" extends, and the difference is that to him—and he has made this clear in several of his opinions, and his votes on the court, and clear in his speeches, and clear in his testimony—"liberty" extends beyond the substantive points that are marked out in the Bill of Rights.

It includes a substantive protection for privacy, it includes marital privacy, it includes an evolving understanding of what it is that makes us human beings, and where we draw what he called the "wavering line" is between us and the State.

The CHAIRMAN. How did Judge Bork draw that line?

Professor TRIBE. Judge Bork said if the line wavers, if it is not clearly spelled out in the fine print, if it is not a liberty specifically mentioned, then he does not find it in the Constitution.

The CHAIRMAN. And if he cannot find it in the Constitution, therefore it does not warrant constitutional protection?

Professor TRIBE. And I think that is where they agree. You have got to find it in the Constitution, but the Constitution, as Judge Kennedy reads it, is considerably broader than the Constitution as Judge Bork seems to have read it.

The CHAIRMAN. Now much that Judge Kennedy said yesterday, and the day before, I found not only compelling but reassuring. I, like you, do not think I have a right to—and I have said this from the beginning, as long as I have been on this Committee—to insist that the person who goes to this Court, or any other court, share all of my views, or even the majority of my views on the substantive issues, but has some constitutional philosophy that resembles what I think should be on the Court.

But I have to tell you, I still have some concerns about Judge Kennedy, and I would like to list several of them for you, and then stop and let you respond.

In the area of privacy, as I said, I found much of what Judge Kennedy said to be within a tradition of evolving human dignity and human liberty that I find in the Constitution, and that the Supreme Court has protected and advanced over our 200-year history.

But frankly, Professor, Judge Kennedy has a point of view that you and I both know, may—at least I speak for myself—may challenge, may cramp what he may do in terms of the challenges the Court will face—not the ones they have already faced, but what they will face in the area of privacy.

And that I wonder whether or not he will continue to be part of this evolution that has taken place over the last 200 years regarding human dignity and human liberty.

These new problems will demand Justices committed to, I think, sustaining and promoting that tradition by being sensitive to the role of government in its confrontation with individuals, and those concerns of individuals' personal zones of privacy, to which he referred.

Do you see anything in his record that reassures you, that Judge Kennedy will be part of the continuing tradition of liberty as it applies to new situations and new problems that the Justices are going to have to face?

Professor TRIBE. Senator, I think we have no guarantees, but in the thoughtfulness, the articulateness, the openmindedness, the passion with which he expressed his vision of a Constitution that we come to understand better as we develop as a society—through that expression, I have as good a reason as I can to hope. He does seem, to me, to be openminded, and, in opinions that he has written, when he could have decided simply—in the case where, for example, a child was bribed to tell where his mother had hidden something—he could have said this shocks my conscience, but instead, he connected his decision with an evolving understanding of family privacy.

Now I do not know where he will go with that, but we are not entitled to that kind of guarantee.

The CHAIRMAN. In the area of affirmative action, Judge Kennedy has expressed what would seem to me to be a very cautious attitude toward remedies for discrimination.

We discussed his opinion in the *Aranda* case, in particular.

Do you see anything in Judge Kennedy's record, that reassures you that he will provide a moderating voice on the Court?

Will the Court, with a Justice Kennedy, continue to recognize the need for carefully considered affirmative-action programs and remedies? I know you cannot say for sure, but what does your instinct tell you?

Professor TRIBE. Well, my instinct is to hope so, and to think that this is an area where the Court has been cautious, and ought to be cautious. It ought not to run head-long into areas that are deemed terribly controversial.

But even in the *Aranda* case, where I am troubled by his ruling with respect to Mexican-Americans—even in that case, unlike the two colleagues that he had on the bench, he went out of his way to suggest—not just before this committee, but in the opinion that he wrote, a concurring opinion—that narrower remedies, including a movement in the polling places to places within the Mexican-American community, might have been appropriate.

Now I wish he had made that opinion a dissent rather than a concurrence. It would not have changed the outcome, but it would have sent a better signal.

And I am pleased that, in his list of heroes of Justices on the Court, he did not include only those who always go along in order to get along.

His list, as I remember it, to Senator Heflin, included at least five great dissenters—people like Holmes, and Brandeis, and Car-

dozo, and the first Harlan, and Black, in the early years of his career.

So it seems to me that there is reason to believe that we have here someone who is truly groping for justice, and who will be even more sensitive in the future than he has sometimes been in the past.

The CHAIRMAN. Well, I have more questions but my time is up.

[Response to question of the Chairman:]

QUESTION FROM SENATOR BIDEN FOR PROFESSOR LAURENCE TRIBE

1. One of the most significant controversies regarding Judge Bork's nomination involved his views on the role of stare decisis. Many of Judge Bork's critics argued that his record indicated that he would have little respect for Supreme Court decisions, and would not hesitate to overrule those decisions with which he disagreed. Some of Judge Kennedy's critics have questioned the strength of his respect for precedent. Do you see a substantial difference between the views of Judge Bork and Judge Kennedy's position on this issue?

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January 11, 1988

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Biden:

The following is in response to your question of December 18 concerning the Supreme Court nomination of Judge Anthony Kennedy.

My review of Judge Kennedy's judicial opinions and of his speeches suggests to me that he has an entirely appropriate view of the role of stare decisis, presenting none of the peculiar difficulties posed by Judge Bork's apparent views on that subject. The Committee will recall that, in the case of Judge Bork, numerous pronouncements, some of them made after his appointment as a circuit court judge, strongly suggested not only that he recognized a judicial obligation to reconsider clearly erroneous constitutional rulings -- an obligation virtually all Supreme Court Justices have acknowledged -- but also that he felt no hesitation to overturn decisions that departed from his quite rigid notions of "original intent." On numerous occasions, in fact, Judge Bork had suggested that, unless entire industries or institutions had been constructed in reliance on a long line of well-settled rulings, a Supreme Court Justice committed to following the Framers' original intent should have no reluctance at all to overrule a Supreme Court precedent of a non-originalist sort. The upshot was that Judge Bork came to the Committee as a jurist with a program that seemed to portend constitutional revolution rather than continuous evolution of constitutional doctrine.

Judge Kennedy, in sharp contrast, has both expressed in his speeches, and exemplified in his judicial work, a commitment to gradual evolution of doctrine and precedent, within the context of a principled exposition of constitutional text, history, and structure that is not tied down by any doctrinaire and backward-looking philosophy of an originalist sort. Of course, Judge Kennedy recognizes a judicial duty to reexamine prior decisions when powerful arguments are mounted that those decisions were profoundly misguided -- especially in the constitutional setting, where a judicial refusal to reconsider past errors may be particularly devastating given the difficulty of changing the constitutional text through the amendment

process. But such a willingness to reexamine the past seems, for Judge Kennedy, to be part and parcel of a generally open-minded and evolutionary approach to law itself as an organic, developing body of understanding.

Indeed, among the most striking of Judge Kennedy's views as expressed in his testimony before this Committee in December 1987 was his notion that, with the passage of time and the flow of history, judges become not less capable of divining the original meaning of constitutional provisions enacted long ago but more capable of understanding what those provisions truly meant and should be interpreted to mean. For the understanding judges seek is not a strictly historicist unearthing of the subjective beliefs or assumptions of particular individuals who may have written, or voted for, specific texts but, rather, an appreciation of the objective principles and premises implicit in the texts promulgated through the institutional process of constitution-making.

In the context of this quite subtle and indeed profound conception of the judicial process, it is not surprising that Judge Kennedy should have testified, as he did, that stare decisis is less a method or doctrine than a summary of how courts, building their understanding of texts and traditions in part upon the perceptions of their judicial predecessors, inevitably operate in a system such as ours. Just as Judge Kennedy opined that the search for "original intent" is less a method to be followed than a goal to be sought, so he opined that respect for precedent is less a technique to be codified -- complete with rules as to when precedent should be deemed less binding than usual -- than an objective to be pursued. Ideally, in the judicial world envisioned by Judge Kennedy, it is the ongoing process of refining and perfecting the vision of the future implicit in the work of the past that marks the judge's mission. By definition, that mission is respectful of, but not rigidly bound by, decisions made by prior courts. That view of stare decisis, if I understand Judge Kennedy correctly, is considerably more humble, more modest, and more attuned to each judge's need to draw on the wisdom of those who came before him, than was true of the approach championed by Judge Bork. I count myself a critic of the Bork approach and an admirer of the Kennedy approach.

Respectfully submitted,

Laurence H. Tribe

Laurence H. Tribe

LHT:lks

The CHAIRMAN. Before I yield to my colleague from Wyoming, let me do a little bit of housekeeping. It will take 30 seconds. For those witnesses who will come later, I asked yesterday if one panel, the only panel we know that is in dissent, wanted to go earlier in the day. They said they did not want to go earlier in the day.

They have now requested that they go earlier in the day. In keeping with the tradition that we go with a panel that is for, and then one that is against, and one that is for, I am going to move the dissenting panel up after Mr. Griswold testifies.

So they should be read. And then we will move with the panel that is listed as next on the agenda, and we will end with a panel that is for.

So the panel including National Organization for Women, and ADA, who are against, will go after Mr. Griswold.

I yield to my colleague from Wyoming.

Senator SIMPSON. Mr. Chairman, I thank you. I do want the record to reflect that—you know—as we bring up the similarities and differences of this nomination, and Robert Bork, that it is not confined to just those of us on this side of the table.

I think we can already determine that. That it comes from both sides of the table, because that is the thing that is seared closest in our minds, and so it is not coming from this side, or, from the right. It is coming from that side, and the left.

So I just want to kind of get that out, for whatever purpose it is, for the record, because I think it is very vital.

It is good to see you, sir. We had a very lively and interesting exchange during the—I was going to say the Bork hearings—but we will just say, from now on, the previous matter.

Professor TRIBE. I enjoyed that exchange too, Senator.

Senator SIMPSON. Yes, the previous matter. And I enjoyed that because I have the greatest respect for you, and I really believe, hopefully, God willing, and the voters, that you will be here at that table with an opening statement in a different capacity, if there is a different President, a President of the Democratic Party. I think you would be one of the first choices.

And you are a spirited and articulate man, and we did differ, but I enjoyed that very much. And now, you are here to testify for Judge Kennedy. Now when you add that to your support of Judge Scalia and Justice O'Connor, you are batting 750.

Professor TRIBE. I think it is more like a thousand, Senator.

Senator SIMPSON. Well, not quite, you see. We have the other matter to refer to.

Professor TRIBE. Yes. We have a difference on the other matter.

Senator SIMPSON. The other matter.

Professor TRIBE. Right. I thought I was right and you thought I was wrong.

Senator SIMPSON. That is right, but you are batting 750 which is better than Ted Williams ever did, and that is good, and that shows your balance, and, indeed, it is so.

You have referred to in your remarks, and in your oral presentation, to "sensitivity," the sensitivity, the passion of this man, and I see that, too, and I agree with you, and it is very evident.

And indeed his writings, his opinions, do show that important willingness to go as far as he can without necessarily going any further into his own philosophies, or own opinions, if you will.

But I was struck—and I agree with you, totally—that is a very critical thing for a judge to have, or a politician to have, and that is "sensitivity," and it is something that is very important to me, and to you, obviously, and to Judge Kennedy.

I was interested, as I have reviewed the transcript of "the other matter," and this. Let me just share a couple of phrases with you. It is kind of a quiz. Now they never gave me true or false quizzes in law school, I needed them to get through—I can tell you—but I never got them.

But here are a couple of comments, and just tell me which one, if you can, the nominee in the other proceedings, or this one, who said: "The framers wrote a Constitution and well understood it was to apply in circumstances they could not foresee."

Professor TRIBE. That is Judge Bork speaking, as I recall.

Senator SIMPSON. That is Judge Kennedy.

Professor TRIBE. Well, you got me once.

Senator SIMPSON. No, wait. I know. We are not——

Professor TRIBE. But actually, Judge Bork said exactly that in a couple of articles.

Senator SIMPSON. You are right.

Professor TRIBE. We all start with that premise. The framers were not prophets.

Senator SIMPSON. I know, and I am not going to do that. I do not want to be, you know, a smart ass.

Who said this? "Constitutional law is not static. It will evolve as judges modify doctrine to meet new circumstances."

Professor TRIBE. Well, I do not think I want to fall for this a second time, Senator.

Senator SIMPSON. No, and don't fall for it.

Professor TRIBE. What are you trying to ask me?

Senator SIMPSON. I am just saying that the same things that were said in "the other matter," under oath by this other man——

Professor TRIBE. Yes, but out of context, perhaps.

Senator SIMPSON. Well, out of context or not, they were said under oath, rather meaningfully.

Professor TRIBE. Let me stipulate that Judge Bork has said many very fine things. I said that when I testified.

Senator SIMPSON. Let's get back, just quickly, to the right to privacy, because it keeps coming up again and again and again, but I still think nobody has said it any better than Judge Griffin Bell, when he said: "It's the right to be left alone."

Professor TRIBE. Actually, Louis Brandeis had said that.

Senator SIMPSON. Was that his?

Professor TRIBE. That was his line. That was his line. [Laughter.]

Senator SIMPSON. All right.

Professor TRIBE. Are you keeping score?

The CHAIRMAN. This is not time to quibble about things like that.

Professor TRIBE. But Judge Bell did—I think he quoted him.

The CHAIRMAN. Did he attribute the quote? That is the question. That is the question. [Laughter.]

Professor TRIBE. I think he quoted him without attribution, as a matter of fact.

Senator SIMPSON. Well, this is going to deteriorate, terribly, but I want to just ask on privacy, because it is so critical, it comes up again and again, and again.

Here are the two phrases, and I will tell you who said what, but they seem similar to me.

Judge Bork said: "No civilized person wants to live in a society without a lot of privacy in it, and the framers in fact protected privacy in a variety of ways." That is what he said.

Professor TRIBE. But then he listed specific provisions of the Bill of Rights.

Senator SIMPSON. Yes, yes, I know. And then Judge Kennedy said: "It seems to me, to most Americans, lawyers and judges, liberty includes protection of the value we call privacy."

All I am saying is—and I have several others here—the sole task of a judge is his duty in judicial restraint. He said a judge has power over people, it is important since he is unelected, and probably unrepresentative of the American people, that he demonstrate by his reasoning that there is a law that he is applying, that he is not applying his personal values or principles. That was Judge Bork.

The sole task of a judge, according to Judge Kennedy, is to transfer the framers' or legislators' morality into a rule to govern unforeseen circumstances, that abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

So, it is interesting to me that there are similarities, to a great extent, in their philosophies, and in the process, those things were said under oath in the previous proceedings, and apparently disregarded.

Professor TRIBE. Senator.

Senator SIMPSON. You will win this test.

Professor TRIBE. Actually, it was not a test, Senator. I just wanted to ask if you remember a test that Senator Biden gave—I guess it was Judge Kennedy—when he asked about the *Griswold* case, and Judge Kennedy said:

> Well, I can't tell you that particular case, whether I like the opinion, but I can say that if a hypothetical case were to be imagined that fits better within the privacy that I believe the Constitution protects, I couldn't think of a hypothetical better than *Griswold*.

Whereas, Judge Bork said that *Griswold*—you know—the right of a married couple to decide about birth control, and the right of a company to pollute, are the same to him. I mean, they take the test differently.

Senator SIMPSON. But Judge Bork said it was a "goofy law," too. We want to remember that.

The CHAIRMAN. Judge Bork also said—if I may interject here—that he could find no marital right to privacy in the Constitution, and Judge Kennedy said specifically he found a marital right to privacy in the Constitution. Fundamental difference.

Senator METZENBAUM. Is this a test this morning as to who remembers better what somebody said on a previous occasion?

The CHAIRMAN. Yes, and you are about to flunk if——

Senator METZENBAUM. No question about it, but I am going to attribute my flunking appropriately.

Senator SIMPSON. Thank you, Mr. Chairman.

Senator KENNEDY. Professor Tribe, I want to join in welcoming you back, again, to this hearing, and to our committee, and also to commend you for the work that you have done with our committee over a long period of time on a variety of issues; and we are always well-served by your appearance, and your responses to questions.

Just, again, quickly. In your formal presentation, at page 20, and continuing on for several pages, you express some concern about the Judge's decisions in the areas of civil rights.

I am wondering what you might tell us, given what he had written, and also, what his responses have been in the course of these hearings, whether it is the *Aranda* case, the *Circle Realty* case, some of the others that are related to the problems—I will come to the gender issue, the women's issues after. But one of the concerns that at least I was addressing is his sensitivity to those who have been left out, and really left behind, whether it is minorities, or the handicapped, or the poor, or women in our society.

You comment on that in a general way in your formal presentation. You have heard him speak. I want to hear you, briefly, on that, and then, if that bell goes off, I hope you will take a moment or two to talk about what assurances women should be able to reach, both in terms of the cases that he has decided—the *AFSCME* case—and also, his responses to the questions on discrimination, invidious discrimination, and his general comments in that area.

Those are really the things I would be most interested in, in the time that I have available.

Professor TRIBE. Senator, I think the primary assurance is an assurance that here is someone who listens, who has evidenced at least the sensitivity to grow.

He talked about the fact that he was not really proud of some of what he had done with respect to those private clubs. He talked about how much he has come to realize that, even if discrimination is not intended, that it can hurt, that it can retard the development of a fully integrated society, and the ending of discrimination.

A number of his quite narrow interpretations of some of the statutes, civil-rights statutes protecting minorities, protecting women, protecting the handicapped—interpretations in which the United States Supreme Court ended up going the other way, some times nine to nothing—these are cases in which he said he now fully accepts the correctness of what the Supreme Court did.

He said, in response to, I think a question that you asked, Senator Kennedy—"I do not think that those statutes"—referring to the civil-rights statutes—"should be interpreted grudgingly."

"There is," he said, "a certain amount of finger-pointing that goes on here, where the courts say the Congress didn't write the statute clearly enough." But he says: "I have come to recognize that the workload of the Congress is such that we have to interpret the statutes as they are given to us."

Now I read no promise, no promise in that statement, but I hear the voice of someone who is saying, "perhaps I have been, at times, a bit narrow in my reading of these statutes."

This is not someone with a fixed commitment to a particular grudging view of the law. This is someone who is 51 years old, who I think is capable of development, and, in the particular cases that are most troubling, this is someone who does reach out.

I do not agree with his decision in the Mexican-American at-large voting case. I think he should have gone further. I think he should have made his separate opinion a dissent. Maybe he would have had more persuasive force with his colleagues if he had.

But it is to his credit that, rather than saying, "I'm slamming the courthouse door on you, go away, I'm giving you no help," he went out of his way—as he put it correctly in his testimony—virtually to outline an alternative, and a more creative complaint that would have provided possible relief to those people.

So it seems to me that, though one might hope for something more, or different, there is here a very real basis for believing that there is an openminded commitment to justice.

Senator KENNEDY. Just—and I think you have referred to it—what do you think that you could tell women in our society, based upon his writings, and in terms of the statements that he has made—about his understanding of the real problems of discrimination that may not be so explicit—where the tracks may not be so evident as to be found in a clear statement of bylaws or statutes—but which would be in existence in a world like today.

What do you gather from his statements, or his comments, or any of his writings—what would you say by way of assurances to women in our society that their interests and rights will be protected?

Professor TRIBE. Well, I think, Senator, it would be presumptuous of me to offer assurances to anybody. I mean, people who are concerned, based on this record, I think have a legitimate reason to speak. But I, at least for myself, took some assurance from his testimony here, that he recognized that when injuries to various groups, including women, are—I think these were his words—"enduring, visible, hurtful, and condoned," then that is bad enough to call it intentional.

And I think his views of original intent, strangely enough, have a relevance here. He realizes that what is really important is the institutional meaning of an act, not just the subjective intent of those who did it. That is why he reads the Constitution in a sense that does not require trying to get inside James Madison's head.

And it seems to me that he has made progress toward understanding that when clubs and institutions and government bodies do things, even thoughtlessly, not necessarily with hostile animus, that do hurt those who have been left out, that there is a real problem, and I think he has made progress towards understanding that.

I think it is interesting that he volunteered here—he was not pressed—he volunteered that he thought we do not have a "free society" as long as people are left out because of their race, or because of their sex.

He had no trouble with Senator DeConcini's questions about whether the Court has moved in the right direction when it comes

to extending the guarantees of equality to deal with problems of gender.

In fact the only issue he raised about equal protection and gender was whether the Court had gone far enough. He said maybe we should have strict scrutiny and not just heightened scrutiny in gender cases.

He was unwilling, as others have been—and I take Senator Simpson's suggestion that perhaps we put this in more anonymous terms—he was unwilling, as others have been, to say that mere rationality and reasonableness are enough for gender.

So there is a real basis for promise here.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from Pennsylvania. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Professor Tribe, I note in your prepared statement, your observation that, "Little can be gained from seeking any single unitary theory for construing the Constitution."

I believe that Judge Kennedy's testimony approximates that generalization, but in some of his writings he had commented about the requirement that there be some connection between original intent and the holding of the Court.

I had explored with him, at some length, the *Brown* v. *Board* case, on the proposition that in seeking framers' intent, it was pretty clear-cut that the prevailing practice, in many parts of the United States, called for segregated schools, including the District of Columbia. That the Senate Gallery was in fact segregated.

So that if one seeks original intent as the lodestone for interpretation of the Equal Protection Clause, *Brown* v. *Board of Education* went contrary to original intent.

I would start by asking you your judgement, as to whether there is any way to construe *Brown* v. *Board* to comply with the intent of the framers of the 14th amendment, Equal Protection Clause, where they lived in a segregated society with segregated schools?

Professor TRIBE. Senator Specter, on that one I think my answer is almost exactly the same as Judge Kennedy's. That is, he draws a distinction, and I would draw it as well, between the intent at an institutional and general level, that is expressed in the public acts of those who promulgated and those who ratified the 14th amendment, and the subjective, specific assumptions of the particular individuals involved.

I think we all recognize that they lived, at that time, in a segregated society, and if someone had asked them, "are the practices of your society consistent with what you have projected into the future, in the Constitution, as a compact with the future," I think most of them would have had to concede, "no, they are not necessarily consistent, we do not yet practice what—through the Constitution—we have decided to preach."

But I think Judge Kennedy was right when he said that they promulgated the Constitution anyway, and were willing to be bound by its consequences.

They wanted to rise above its injustices. So that it is, I think, entirely right to say that if by original intent we mean the specific

subjective assumptions of those who wrote it, then you cannot justify decisions like *Brown* v. *Board*.

Such a decision is right, it is moral, it is lawful, precisely because the relevant intent is not what was going on inside the private thoughts and assumptions of a particular set of draftsmen.

We are bound by the objective intent, and as Senator Hatch I think likes to express it—the "original meaning" of the Constitution. And when the Constitution is promulgated with words as general as "equal protection of the laws", then we are bound—we are trying to interpret those words to seek not the subjective specific intent of those who wrote them, but the objective intent that was expressed through the words they chose.

Senator SPECTER. Professor Tribe, where the 14th amendment contains the language, "equal protection of the law," which is a generalization, and then you have the issue as to whether there ought to be segregated schools, which is a specification—if you elevate constitutional doctrine to require the application of the intent of the framers, and you deal with the specific of desegregating the schools, how can you say that looking to what was in the minds of the framers, as it applies to the specific issue—segregated schools—that there is anything but an intent that equal protection does not include integration?

Professor TRIBE. Senator, your premise, if you look into the "minds of the framers" as to their specific intent—given that premise, your conclusion surely follows, and what I would argue, what Judge Kennedy seems to believe, is that the premise is wrong.

We should not have a jurisprudence of original specific subjective intent, but that does not mean that the purpose of the Constitution somehow becomes irrelevant.

The mistake is to ignore that you can seek the meaning of the Constitution and resist imposing your own will, without suddenly falling into the trap of enforcing the specific subjective intentions of the framers.

Those specific subjective intentions never became part of the Constitution. So that I think we agree, though the labelling may be different.

Senator SPECTER. Well, we all agree with the conclusion of *Brown* v. *Board of Education*, but what I am looking toward is whether there is an ideological straitjacket to be applied on framers' intent?

Professor TRIBE. And I agree with you, Senator, that there is not, and oughtn't to be. That if there were, if there were a narrow, specific subjective straitjacket, not only would particular decisions like *Brown* be wrong, but the Constitution would be frozen. It would be stillborn.

It would preserve the status quo that they assumed was perhaps lawful, and then why bother—as Judge Kennedy asked—why bother promulgating a Constitution? So that straitjacket seems to me to be wrong, and I agree with you.

Senator SPECTER. Well, do you believe that it is ever appropriate for the Supreme Court to decide a case at variance with framers' intent?

Professor TRIBE. With the specific subjective intent, yes. At variance with the general purpose that the framers had, as expressed in the general language they chose, no.

I think that judges are bound to enforce the Constitution, and that doing that requires—and here is where I think Judge Kennedy's subtlety is really very powerful—it requires recognizing that we can learn from the history and the tradition of interpreting the Constitution.

It is not as though, by getting further from the moment at which they wrote, we somehow lose our understanding of what they did. By getting further from it, by looking at it in the light of what has transpired since, we can develop a clearer understanding of the meaning of the grand promises that they wrote into the Constitution.

I think it was really very insightful for Judge Kennedy to formulate it that way. I have not read it formulated that way.

Senator SPECTER. That is news to you?

Professor TRIBE. Well, the idea is not entirely new, but for those who often say of Judge Kennedy, he is not as brilliant, not as articulate as some others, they are wrong.

This man is capable of articulating a powerful, coherent vision, and of making it understandable and appealing.

Senator SPECTER. I agree——

Senator KENNEDY. The Senator's time is up. The Senator from Ohio has indicated he is ready for questioning, so I will recognize him, and then return. The Senator from Ohio.

Senator METZENBAUM. I just have a few questions, Mr. Tribe. I am happy to see you before our committee again.

You did testify, quite eloquently, in connection with the earlier nominee. What would you say is the most important difference between Judge Kennedy and Judge Bork?

Professor TRIBE. If I had to reduce it to a single, most important difference, I suppose it would be that Judge Kennedy is not an ideologue with a clear agenda of revisionism.

He is an openminded person with a commitment to an evolving Constitution. He is more cautious, more respectful of tradition, more flexible in his understanding of the Constitution, and I think he means it when he says, in response to—I think it was a question from Senator Humphrey—he has no list of major constitutional advances that he would like to see undone.

Then there are a lot of specific differences, about liberty, about free speech, where he says that the free-speech clause protects all ways in which we express ourselves as persons. With respect to equal protection, with respect to Congress' power to enforce the Constitution. With respect to the role of the Court as an umpire of disputes between the legislative and the executive branches.

There are enormous, specific differences, but the fundamental, the most general difference is that, in the nominee that the President has sent to this committee now, I see a fundamental, principled commitment to an evolving constitutional understanding and not a clear agenda of going back to some narrow concept of specific original intent, and wiping away a number of very fundamental, important gains in our understanding of constitutional justice.

Senator METZENBAUM. Do you see a potential leadership role for Judge Kennedy with respect to the rights of individuals under the ninth amendment?

Professor TRIBE. Well, Judge Kennedy was very careful in expressing his views of the ninth amendment. He described one theory of it, that it was primarily designed to protect the ability of the States to confer and create rights beyond those of the Bill of Rights.

He, on the other hand, also explained that he thought it was designed to make clear that the specific rights of the Bill of Rights do not completely exhaust all of those rights that are protected.

But what was most important, I thought, was his statement in response to the Chairman's question about Chief Justice Burger's opinion in the *Richmond Newspapers* case.

Chief Justice Burger said it does not matter if the basic right of the press and the public to attend criminal trials is not spelled out "in fine print," to use your phrase.

It is basic to liberty. And Chief Justice Burger pointed to the ninth amendment as what he called a "savings clause," in order to bolster that conclusion.

Judge Kennedy referred to the ninth amendment as a "reserve clause", but importantly, he said you do not necessarily need it if you have a broad enough understanding of that spacious word, "liberty," and I do see a possible leadership role in the broader understanding of liberty, that Judge Kennedy articulated.

Senator METZENBAUM. This calls for an opinion only, because it is easy to speculate.

But sitting there, as you do, and having been involved in this issue, and other issues having to do with Supreme Court nominees, do you have an opinion as to what special contribution, if any, you think Judge Kennedy might make to the Supreme Court?

Professor TRIBE. Senator Metzenbaum, I think he would bring to the Court a distinctive combination of intellect, openmindedness and experience.

He has had experience as a practicing lawyer dealing with ordinary human problems. He has had an experience as a distinguished judge.

He has shown in his writing that he is searching, that he is searching for an understanding of the Constitution. In that sense he would differ from those members of the Court who think they have already found it.

He would also differ, I think, from those members of the Court who have a very *ad hoc* approach to particular problems, who are not engaged in quite the same intellectual quest for a set of principles that is faithful to an evolving understanding of the original intent of the Constitution.

What was most distinctive about the vision, as he described it, was that as we develop, and as we build up decisions interpreting the Constitution, we can perfect an understanding of the principles implicit in that document.

It is not as though, by getting further from the founding moment, we become somehow lost at sea, and that we need to be returned to a "golden age" of constitutional truth. I think that

those perspectives are distinctive, and I would look forward to seeing the way he developed them on the Court.

Senator METZENBAUM. I have one last question. In your written testimony, you criticized Judge Kennedy's decisions in the *TOPIC* v. *Circle Realty* case, the *Aranda* case, and the *AFSCME* case.

What did Judge Kennedy do wrong in those cases? And what advice, if any, do you have for him when he encounters similar cases in the future?

Professor TRIBE. Well, if there are similar cases in the future, I suppose that that advice would be better presented in the form of briefs and arguments than in the form of testimony now. But what I think he may have done wrong differs from case to case.

In *TOPIC*, I think he read the relevant statute too narrowly in not providing access to court of a kind that the Supreme Court itself was willing later on to recognize.

In the *AFSCME* case, I think he was not as sensitive as he should have been to the factual findings indicating government complicity in a discriminatory structure.

And in the *Aranda* case about which you questioned him, I think perhaps he should have gone further and made his opinion a dissent. He should have suggested that, on the basis of the evidence before him, there was enough to at least have a trial with respect to narrower remedies. But at least he did move separately to suggest possibilities to the litigants. And I think that he is quite capable of getting along without my suggestions.

Senator METZENBAUM. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

The Senator from Pennsylvania has a couple more questions.

Senator SPECTER. Mr. Chairman, one comment and one question.

I am intrigued, Professor Tribe, by your description of institutional intent, picking up on what Judge Kennedy testified to yesterday, and your statement that Judge Kennedy had a novel approach to institutional intent. It may be that realistically we have read out framers' intent as a doctrine that has to be observed in judicial interpretation, but sort of mythologically have left it in in calling it institutional intent. We may have established some sort of a precedent here.

The one question which I have for you at this stage involves the appropriate practice of the Judiciary Committee in looking to judicial philosophy. And I note at the outset of your prepared statement you have quoted Chief Justice Rehnquist's recent speech which goes back to his approach in 1959, when as a lawyer he took the Senate Judiciary Committee and the Senate generally to task for not probing Judge Whittaker on judicial philosophy on equal protection of the law and due process.

I know from your statement you have concluded that it is appropriate to ask about judicial philosophy, and my question to you is: What value do you see from the back-to-back proceedings of Judge Bork and now Judge Kennedy, with both Judge Bork's detailed responses on judicial philosophy and Judge Kennedy's equally detailed responses on judicial philosophy on questions which were addressed to him in establishing a precedent, a solid precedent for the Judiciary Committee to insist on such answers from future nominees?

Professor TRIBE. Senator Specter, I think that there is enormous value, both to constitutional democracy and to public education, from the role that this committee has played in pressing the nominees before it to explain in some detail the way they think about legal and constitutional problems. And I think that both nominees, both the one who was rejected and the one who is currently before the committee, are to be praised for having cooperated in such detail.

Whatever one thinks—and I know there are differences between members of this committee—whatever one thinks of why the Senate ultimately did what it did with respect to Judge Bork—and I tend to think that it acted responsibly—whatever one thinks about that, it is impossible to deny that the spectacle of detailed, thoughtful questioning—questioning in which you played, obviously, a very important role, and questioning in which the Chairman and everyone played, I think, a very important role—the spectacle of that kind of questioning on national television, during the year of the Bicentennial, made an incredibly important impact in popular participation in the processes of constitutional democracy, and in popular understanding of what the Constitution is about and what the Court's role is.

There is no tension at all between that kind of give and take and the ideal of judicial independence. That is where I most particularly agree with Chief Justice Rehnquist when he said that this kind of inquiry serves as a way of "reconciling judicial independence with majority rule." The reason, in part, that we can entrust judges with life tenure to interpret the Constitution and make decisions of such great moment in our lives is that we do not leave it just to the President unilaterally to decide, "well, this is my kind of judge." We now engage—and I think the Senate has sometimes engaged in the past, but less consistently—in really close inquiry into what the philosophy is.

I think the committee is to be commended for it and the nation is better off for it.

Senator SPECTER. So that is a yes answer. We have a little stare decisis going for us now?

Professor TRIBE. A long yes answer.

Senator SPECTER. We have a little stare decisis going for us now on this issue?

Professor TRIBE. I think so, Senator.

Senator SPECTER. Thank you.

The CHAIRMAN. Professor, you have made a significant contribution to the establishment of that stare decisis, and I think your objectivity has been shown and reinforced. You are here today to testify on behalf of a nominee with whom you do not agree on everything, and you had the courage to testify in opposition to a nominee. You make complicated notions very explainable and understandable to people, and you have done a great service to the committee and, I think, to the country.

I want to thank you for being here, and I hope you are not offended by the fact you have not been kept on the stand for a half a day like you were last time.

Professor TRIBE. I am not offended at all. I am quite relieved, Senator. Thank you.

The CHAIRMAN. Thank you very much.

Our next witness, Erwin Griswold, is one of America's most distinguished legal scholars. He was for many years the dean and Langdell Professor at Harvard Law School. He served as Solicitor General of the United States from 1967 to 1973 for Presidents Johnson and Nixon, and he has since been in private practice with the law firm of Jones, Day, Reavis and Pogue here in Washington.

Dean Griswold, it is, indeed, an honor to have you back before the committee and to have your testimony today. Would you please stand and be sworn?

Do you swear that the testimony you are about to give will be the whole truth and nothing but the truth, so help you God?

Mr. GRISWOLD. I do.

The CHAIRMAN. Dean, do you have an opening statement you would like to make?

TESTIMONY OF ERWIN GRISWOLD, FORMER DEAN, HARVARD LAW SCHOOL; FORMER SOLICITOR GENERAL

Mr. GRISWOLD. Yes, I have a few informal remarks.

My acquaintance with Judge Kennedy began just short of 30 years ago when I was Dean of the Harvard Law School and he came as a student in the fall of 1958. His mother and my wife had gone to Stanford together, and his mother wrote to my wife. And we had him out for Thanksgiving dinner. I mention that only to indicate that I had some reason for watching him among the many students that we had.

He was very successful in his first year and became a member of the Board of Student Advisers, one of the honor organizations at the law school. And he was a student in my tax class and was particularly interested in becoming a tax lawyer. He graduated in 1961 cum laude, which meant that he was well within the top ten percent of a highly selected class.

After that, he went to San Francisco where he practiced in a substantial law office for 3 years, and then came back to his home city of Sacramento where he had a quite wide-ranging practice including resolving problems for people and dealing with the State legislature, which, of course, met in Sacramento. So he had a very broad experience in the operation of the courts and of the Government.

Then in 1975, President Ford appointed him to the Ninth Circuit Court of Appeals. He was then 38 years old, not as young as Joseph Storey was when he was appointed to the Supreme Court at the age of 32, which now seems rather miraculous to us. But he was one of the younger judges.

I had followed him in his career at a distance. He was out on the West Coast, and I was on the East Coast. We have never been intimates. I have never been in his home, but I have seen him from time to time at Harvard Law School gatherings. Also, in the course of my practice the last 15 years—which has been largely appellate—I have had occasion to see his opinions, and I have read many of them and have been consistently well impressed by them. They seemed to me to be thorough and careful and narrowly written to deal with the specific issue. He does not write in sweeping terms. He does not lay down broad general propositions and then deduce his conclusion from what he has already assumed in stating his broad major premise. He does not have an agenda. He is not reaching out for goals. He seems to me to follow the true spirit of the case approach which is the heart of the common law; that is, take up this case, consider the facts which are applicable to this case, determine the law which you think applies to those facts, and decide this case. There are other cases out there, but do not decide them now. Wait until they come and see what the facts are when that time comes.

He interprets and applies the Constitution, including those many parts of it which are not stated in specific terms, like problems of federalism, the relations between the federal government and the States. That is nowhere spelled out in the Constitution. It is simply implicit in it. It is a federal government. Courts have to determine where the boundaries lie between federal power and State power.

The Commerce Clause is, in turn, somewhat sweeping. It says that Congress shall have power to regulate commerce. But it does not say what happens if Congress does not exercise that power. There is in that realm a wide range for judicial consideration not spelled out in specific language in the Constitution as to how far the States can regulate commerce in what the Supreme Court has referred to as the silence of Congress.

Then there are clauses like the Due Process Clause and the Equal Protection Clause and Cruel and Unusual Punishment, which I will not say are wide open but which are certainly not specific and which are subject to evaluation from time to time in the light of the circumstances which exist at that time.

There is one aspect of Judge Kennedy's work with which I was not familiar until he was nominated and some material was furnished me, and that is the speeches which he has given. I have read them in the past 2 weeks with great interest and with continued admiration for not only the clarity with which he writes, but for the views which he has expressed in them.

One of the speeches which I read recently was one he gave in 1986 to the Canadian Institute for Advanced Legal Studies which met that summer at Stanford. It just happens that this past summer, 1987, I was invited to speak to the Canadian Institute for Advanced Legal Studies, this time in Cambridge, England. As I read Judge Kennedy's speech, I must say I was chagrined. His speech is very much better than mine and had in it many things that I wished that I had thought of and had said.

He spoke particularly in that speech of rights which are not clearly stated in the Constitution: the right to travel, the right of privacy, and the right to vote. And by the right to vote, he did not mean particularly the 13th amendment, which is now quite widely applied in fact, though it was not when I was a boy growing up and learning about the law. He was speaking primarily of the decision in *Baker* v. *Carr*, the one-man, one-vote rule which came as something of a surprised—even occasionally, I guess, a shock—when it was announced by the Supreme Court, but which is now very widely accepted.

In my view, his discussion of these rights in that address is masterful, clear, yet never sweeping, never rigid. He writes well; in one sense I think much of his writing is brilliant. But not in the gaudy sense. I do not think he is a phrase-maker. He does not use things which have been used by some Supreme Court judges and which are quotable. But brilliant phrase-makers sometimes get carried away with their own rhetoric, and I see no sign of that.

It seems to me that all of the evidence shows that he is wise, careful, thorough, sound. In my opinion, he will be a great Justice of the Supreme Court, and I am glad to support his confirmation.

The CHAIRMAN. Thank you very much, Dean.

Senator Specter.

Senator SPECTER. Thank you very much, Dean Griswold, for appearing here today.

I just have one question for you, Dean, and that relates to the process that we are following here. I know you were present when Professor Tribe testified. I would be interested in your observations about the propriety of the kind of inquiry which the committee has

made into judicial philosophy with Judge Kennedy and also with Judge Bork. Contrast it, for example, with the very limited responses given by Justice Scalia during his confirmation process.

Mr. GRISWOLD. Well, Senator, I think that is a very important and a very difficult question. As a matter of fact, when I appeared in support of now Justice Scalia, I referred to the fact that until Felix Frankfurter was nominated, it had been the practice that the candidate did not appear before the committee.

For example, Justice Brandeis' confirmation was strongly opposed, an extensive hearing, and he never left Boston. Then Professor Frankfurter did come. He was questioned rather extensively, and since that time it has been done more widely.

Senator SPECTER. Do you recall or know, aptly stated, the circumstances surrounding Justice Frankfurter's appearance before the Judiciary Committee? Did he think he had to appear to get confirmed?

Mr. GRISWOLD. That I could not say. I do know that Dean Acheson was his counsel, and he came with his counsel and had advice, I assume, from Mr. Acheson. But having known the Professor very well, I am quite sure he acted on his own determination.

Senator SPECTER. With the kind of tug and haul we have around here, it has been my thinking that the nominees answer the questions they think they really pretty much have to. When Judge Scalia was before the committee, he answered very little, almost nothing. Chief Justice Rehnquist, Justice Rehnquist in his confirmation proceedings answered some questions but not too many. I think in Judge Bork's situation, with his extensive writings and his extensive opinions, he felt that there had to be responses.

I think we have carried it forward with Judge Kennedy in somewhat different circumstances, where Judge Kennedy did not approach the Judiciary Committee with a vast array of writings that had to be explained, so to speak; and that had he chosen not to answer so fully, that might have proved to have been acceptable. But he did answer, I think, virtually every question put to him, expansively and I think appropriately.

I would be interested in your conclusion as to how firmly you think this precedent has been established for future nominations.

Mr. GRISWOLD. Well, I think, Senator, there is a fine line. Certainly, the nominee should not be asked how he will decide a specific case. There should be no effort, even by intimation, to get anything which is or can seem to be a commitment from him with respect to a decision.

Having said that, I think that has been honored as I have followed fairly closely the recent confirmation hearings. Then it seems to me to be entirely appropriate to interrogate the nominee with respect to his outlook, his approach, to anything he has done in his writings which he may want to explain or enlarge or maybe correct.

So with careful regard to the limits which I think this committee has followed, I think this not only is an important part of the confirmation process, but I think that it has been an extraordinary educational event for the American public.

Indeed, at this meeting with the Canadians I went to last summer, I found that all of the Canadian lawyers and judges had

been watching the previous hearings on television and were filled with questions and learned a considerable amount about the American Constitution and approach from those hearings.

Senator SPECTER. Thank you very much, Dean Griswold.

Thank you, Mr. Chairman.

The CHAIRMAN. Dean Griswold, thank you very much. Your testimony is always sought and much appreciated when given. It means a great deal to us. We thank you very much for coming today.

Mr. GRISWOLD. Thank you, Senator.

The CHAIRMAN. Before we move on, let me explain what will be the remainder of today's schedule.

We will break very shortly for lunch until 2 o'clock. We will begin, then, with a panel that has announced it wishes to testify against the confirmation of Judge Kennedy: Ms. Molly Yard, president of the National Organization for Women; Joseph Rauh, Jr., vice chairman of the Americans for Democratic Action, Inc.; Susan Deller Ross, professor, Georgetown University Law Center, NOW Legal Defense and Education Fund; and Jeffrey Levi, executive director of the National Gay and Lesbian Task Force.

Then we will move to a panel immediately after that that has come to testify on behalf of Judge Kennedy: Gordon Schaber, dean of McGeorge School of Law, University of the Pacific; Leo Levin, professor, University of Pennsylvania Law School; Paul Bator, professor, University of Chicago Law School; Susan Westerberg Prager, dean, University of California at Los Angeles School of Law.

Then we will have our concluding panel for the day, those who have come to testify, raise questions, but as I understand it, not take any position—although it is their right between now and then to take a position if they wish. I am just trying to explain why we have it in this order: Mr. Martinez, the national president, Hispanic National Bar; Audrey Feinberg, consultant, the Nation Institution; and Antonia Hernandez, president and general counsel, Mexican American Legal Defense and Educational Fund.

Several witnesses have indicated, depending on the time, who were scheduled for tomorrow, may decide they wish to testify today. We will make a judgment as the day goes on whether or not that is possible.

The hearing will now recess and resume at 2 o'clock.

[Whereupon, at 1:10 p.m., the committee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. I apologize for the delay in getting started again. We are having a moveable witness list here today, in terms of witnesses who indicated they wanted to testify, or might want to testify, who are now reconsidering that and deciding they may submit statements.

So it only relates to tomorrow's witness list; not to today's.

Our next panel consists of four witnesses. Molly Yard is the president of the National Organization for Women. Joseph Rauh is the vice chairman of Americans for Democratic Action. Susan Deller Ross is a professor at Georgetown University, and is here

today representing NOW, the National Organization for Women, Legal Defense and Education Fund. And Jeffrey Levi is the executive director of the National Gay and Lesbian Task Force.

We welcome you all. If you would all please approach the table and remain standing to be sworn.

Is the testimony you are about to give the whole truth, nothing but the truth, so help you, God?

Ms. YARD. Yes.

Mr. RAUH. Yes.

Ms. ROSS. Yes.

Mr. LEVI. Yes.

The CHAIRMAN. We welcome such a distinguished panel and are anxious to hear what you have to say.

We would like very much if you would confine your statements, each panel member, to a statement of 5 minutes.

If you have a longer written statement, it will be placed in the record as if read, and you will not be limited, obviously, in the answers to the questions that are posited to you.

I suggest we start with you, Ms. Yard, and then go to Mr. Rauh and on down the line, unless you all have a preferred order.

Ms. YARD. We have not talked about.

The CHAIRMAN. Well, thanks very much for coming. And Ms. Yard, would you please begin.

TESTIMONY OF A PANEL CONSISTING OF MOLLY YARD, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN, INC.; PATRICIA IRELAND, VICE PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN, INC.; JOSEPH RAUH, JR., VICE CHAIRMAN, AMERICANS FOR DEMOCRATIC ACTION, INC.; SUSAN DELLER ROSS, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER, ON BEHALF OF THE LEGAL DEFENSE AND EDUCATION FUND OF THE NATIONAL ORGANIZATION FOR WOMEN; AND JEFFREY LEVI, EXECUTIVE DIRECTOR, NATIONAL GAY AND LESBIAN TASK FORCE

Ms. YARD. Thank you. I have, Senator, a much longer statement here than I will deal with at this particular point. And we will appreciate your having the whole record in your report.

The CHAIRMAN. It will be.

Ms. YARD. We are concerned about Judge Kennedy's appointment to the U.S. Supreme Court because of his positions on civil rights cases, and on cases of discrimination against women and employment.

I have with me our vice president, Patricia Ireland, who is a lawyer, who has had a long experience in title VII cases herself.

The CHAIRMAN. Ms. Ireland is sitting behind you to your right?

Ms. YARD. Right. And of course Professor Ross also has a long experience with title VII cases. So for us it is a landmark decision, a case which has gone against us, which has gone against our long struggle to improve wages and salaries for women in this country.

And we find it a very unsatisfactory decision because we believe that Judge Kennedy totally ignored the findings of fact which are very clear if read.

And we see no reason for his having ignored those facts except that he apparently wanted to come to a certain conclusion and therefore conveniently ignored the facts, which showed invidious discrimination, in the words of the district court judge; and which are clearly spelled out if you read the lower court case, and if you read AFSCME's appeal for a rehearing en banc, which was never gone into, because the State of Washington chose to settle out of court.

I want to deal with his membership in private, exclusive clubs, clubs which have not permitted the membership of minorities nor the membership of women; and I must say that I was somewhat horrified by his answers given here.

I think, if you will forgive me, I would like to have a lesson in what discrimination is. I think everyone in this room understands what Rosa Parks was doing and what she meant when she refused finally to move to the back of the bus.

She was saying, just because I am black, I am not going to be treated differently, and I am just as good as anyone else in this country, and I will sit at the front of the bus.

When a woman is invited to a club which discriminates against her, but she is invited by a member to go to lunch, and she goes to the front door, and she is told to go to the back door, the kitchen door, that is saying, to a woman, just as surely as it was said to Rosa Parks, you are inferior; you are a second class citizen; and we will not treat you the same as we treat white males.

It is unacceptable. We refuse to be put in that category. And to make the matter worse, the men who belong to these clubs, take their dues as a tax deductible business expense.

I think it is time we started to understand what discrimination is all about.

And our third reason for opposing Judge Kennedy is that we have no idea what he would do in *Roe* v. *Wade*. And I know you haven't either. And he won't answer it.

But I do think it is very alarming, his one case on privacy, where, in *Beller* v. *Middendorf*, he seemed to be saying there may be a right to privacy but that the requirements of the military supersede.

Is he saying that there may be a constitutional right for women to control their reproductive rights but the requirements of the State can supersede that?

All I can say to this judiciary committee is that I can conceive of very few situations which could be worse for this country than to overturn *Roe* v. *Wade*.

He is replacing Justice Powell, who was with the majority of the court on women's privacy rights. Women will not obey the law if that case is overturned.

Women will go, if they have got money, abroad to get abortions. Poor women will have no choice but to seek back alley abortions, or to self abort themselves. We will again have Saturday night massacres in the hospitals of this country, where women have desperately gone for whatever reasons in their life dictate that they must take this course, who will come to hospitals, hemorrhaging, ravaged from fever from infection, and they will either die or their reproductive lives will be ruined for all time.

It is an unacceptable position for women to be put in in this country, and I think it will bring back the underworld. The whole world of crime was into the business of abortion. It was a totally intolerable situation.

And we simply say, *Roe* v. *Wade* was the law of the land, and it must remain the law of the land. We are talking about living human beings, wives, your wives, your mothers, your sisters, your daughters, and mine.

And they should have the right to control their lives; and the State should have nothing to say about it.

Thank you.

[The statement of Molly Yard follows:]

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TESTIMONY OF
MOLLY YARD
President, National Organization for Women

On Behalf of the National Organization for Women
and the National Women's Political Caucus

Before the Senate Committee on the Judiciary

Against the Nomination of Anthony M. Kennedy
for Associate Justice to the United States Supreme Court

December 16, 1987

I am Molly Yard, President of the National Organization for Women, the largest feminist organization in the United States working on behalf of equality for women. I speak today for NOW and am honored also to speak on behalf of the National Women's Political Caucus in opposing confirmation of Anthony M. Kennedy as Associate Justice of the United States Supreme Court.

Our concern over Kennedy's court opinions on employment discrimination, right to privacy, school desegregation, voting rights and access to courts is heightened by Kennedy's own hiring practices on the Ninth Circuit Court of Appeals and his long-time memberships in segregated clubs. While touted as a "moderate conservative," Kennedy's record reveals a total lack of commitment to equality and justice under law, a commitment which all Americans have a right to expect from those who sit on the bench at every level, but especially on the United States Supreme Court.

We oppose Kennedy's confirmation because of our serious concern

about the impartiality of his legal reasoning and analysis of statutory as well as constitutional law. We are also disturbed to find that in his hostility to enforcement of remedial anti-discrimination laws passed by Congress, Kennedy has demonstrated a wholly inappropriate willingness to go beyond the lawful role of an appellate court judge and to substitute his own version of the facts when the facts found by the trial court do not fit with Kennedy's desired result.

Even when clearly established by the evidence and the lower court's findings of fact, Kennedy has refused to see discrimination as intentional. Because he also interprets anti-discrimination statutes as narrowly as possible, Judge Kennedy has used his failure to see discrimination as intentional for an excuse to deny women and minorities a legal remedy against discrimination.

Kennedy's refusal to see discrimination as intentional and his great willingness to excuse it, is also evident in his attempts to justify his own long-time memberships in discriminatory clubs. To avoid the proscription against judges belonging to clubs which invidiously discriminate, Kennedy tries to create for himself a loophole by saying that the clubs' segregated membership practices were not "intended to impose a stigma" based on sex, race, religion or national origin and were not "the result of ill-will." This novel redefinition of invidious discrimination would, if carried into his court rulings, severely restrict the constitutional guarantee of equal protection under the law.

I hope, but I wonder whether members of the Judiciary Committee really understand race and sex discrimination. You are, after all,

white males who have never suffered such discrimination. I suppose it is fair to say many have come to understand race discrimination after all the civil rights campaigns of the last thirty years and Congressional legislation as well as court decisions dealing with the problem of discrimination against minorities. We now all understand, I believe, that when Rosa Parks finally refused to sit in the back of the Montgomery bus -- a refusal that reached the far corners of the earth -- she was refusing any longer to be treated differently from white citizens simply because she was black.

When a woman is invited to an all-male club for a meal and is refused admittance at the front door and told she must go through the kitchen door, she knows she is being told she is an inferior being, a second-class citizen unworthy of first-class treatment. Or if her professional colleagues, who are male, belong to clubs which refuse her admittance because she is female, she again knows she is being treated as a second-class citizen by men who seem afraid to compete with her on their own merits. To add insult to injury she also pays for that discrimination, because her colleagues take their dues payments as a legitimate business expense and so claim a tax deduction.

Just as Rosa Parks refused to be treated as an inferior second-class citizen, so do all women refuse such treatment. Membership in clubs refusing membership to minorities and women is racist and sexist. I for one do not understand how any man who believed in equal treatment for all could possibly belong to any club which practiced discrimination. It is a total denial of one's commitment to justice, because such clubs, whether they are aware of it or not, stigmatize all

against whom they discriminate.

Judge Kennedy says he tried to change the rules. However, his leaving the Sutter Club over this issue (after enjoying its benefits for seventeen years) but keeping his membership in the Olympic Club belies his commitment to any real change. One may, furthermore, argue that some persons should remain in discriminatory clubs to affect change. That may well be, but those who sit in judgment in a court of law deciding on the rights of those petitioning for redress of their grievances are persons who should never belong to such clubs, for as the ABA has said, "Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions...that the judge's impartiality is impaired."

EMPLOYMENT DISCRIMINATION

Because his opinion in AFSCME v. Washington exemplifies many of our concerns about Judge Kennedy, we will discuss this decision in some detail.

In this case, a class of state employees in job categories that were predominantly female brought a Title VII suit against the state, alleging sex discrimination in employment. The trial court judge found "that the State had knowledge of the sex discrimination in employment before and after the March 24, 1972 Amendment to Title VII; that the evidence shows the discrimination is pervasive and intentional and is still being practiced by the State; and that the State is adhering to a practice of sex discrimination in violation of the terms of Title VII

with full knowledge of, and indifference to, its effect ...."

Despite the findings by the trial judge that the state had paid discriminatory wages based on sex and had done so intentionally, Judge Kennedy ruled on appeal that there was no violation of Title VII. Kennedy premised his decision on his finding that the state had based its compensation system on the "free market." Kennedy then found "nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market." And, although Kennedy admitted that there is discrimination in the free market, he held that "Title VII does not obligate [the State] to eliminate an economic inequality that it did not create."

Thus, the linchpin of Kennedy's decision was his assumption that the state had based its wage structure on market rates. Based on this premise, Kennedy ruled that the pay discrimination by the state was justified.

The problem with Kennedy's premise is that the trial judge made no such finding and it is clearly contrary to the evidence.[1] In fact, the trial court opinion does not even mention the words "free market." If anything about the market rate defense can be argued from the trial court opinion, it is that the trial judge implicitly rejected this

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[1]State officials had testified that, among other subjective considerations, they attempted to "keep the peace" by maintaining "internal alignment" and "historical relationships" in the salary structure. Such efforts to maintain these historical relationships, of course, have the effect of permanently locking into place pay discrimination in female-dominated jobs, irrespective of change in the "free market."

defense by concluding that "there is no credible evidence in the record that would support a finding that the State's practices and procedures were based on any factor other than sex."

Kennedy's willingness to assume as true a factual matter at best not included in the trial court's findings of fact and arguably at odds with the trial court's findings, flies in the face of the federal court rules and Supreme Court precedent on the lawful role of an appellate judge. Rule 52(a), Federal Rules of Civil Procedure, requires an appellate court judge to take the trial court's findings of fact as true unless they are "clearly erroneous." The Supreme Court has emphasized that appellate court judges may not substitute their judgment for that of the trial court on factual issues, but must accept the trial court's findings of fact unless they are so clearly erroneous that no reasonable fact-finder could come to the same conclusion. Anderson v. Bessemer City, 470 U.S. 64 (1985).

Under the federal rules and Supreme Court precedent, one of two courses was properly open to Judge Kennedy. If he believed that the trial court had not given sufficient consideration to whether the underpayment of women's jobs by the state reflected prevailing market rates, he should have remanded the case to the trial judge with directions to make specific findings on this point. If he believed that no reasonable fact-finder could have come to the same conclusion that the trial judge did (that there was no credible evidence that the state's practices were based on any factor other than sex), he should have discussed the evidence regarding market rates to demonstrate why this conclusion was not reasonable or possible. Instead, he took the

wholly inappropriate step of substituting his version of the facts for those of the trial judge.

In a second significant matter, again ignoring the legal restrictions on his authority, Kennedy directly overruled the trial court's findings of fact and held on appeal that the state's wage discrimination had not been intentional. He admitted that an inference of intentional discrimination can be drawn from statistical evidence, such as had been presented in the trial court on behalf of the plaintiffs. He also conceded that there had been independent corroborative evidence of discrimination.[2] However, Kennedy noted that none of the individually-named plaintiffs had testified about specific incidents of discrimination and characterized the other evidence of discrimination as "isolated events."

Thus, Kennedy concluded that the evidence of discrimination was insufficient to establish intent under a disparate treatment analysis, saying in effect that the evidence which convinced the trial judge did not convince him, a clearly inappropriate position under Rule 52(a) and Supreme Court precedent.[3]

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[2]This evidence included sex-segregated job classifications, job advertisements placed under "help wanted - male" and "help wanted - female" columns through 1973, equal pay violations, subjective classification decisions based on sex and statements by state officials and decisionmakers admitting wage discrimination.

[3]Kennedy's consideration of the disparate impact analysis under Title VII was also affected by his inappropriate assumption of a market-based wage system. Selectively citing cases which supported his conclusion and ignoring even Ninth Circuit cases going the other way, he concluded "a compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly-delineated employment policy...that suffices to support a claim under disparate impact theory." Ultimately the conflict in the Ninth Circuit was resolved against the position taken by Judge Kennedy. Antonio v.

Kennedy went far beyond his lawful authority to achieve the result he wanted in AFSCME v. Washington and to promote a political and economic position with far broader implications than the immediate case. His reliance on the free-market system as an excuse for wage discrimination and his refusal to require an employer, even a public employer, to take any action to correct the discrimination raises a significant threat not only to pay equity, but also to affirmative action and other legal remedies against discrimination. His theories sound a warning not just to women, but also to minority men and all workers who depend on the law for their protection.

Judge Kennedy's failure to understand employment discrimination and the broad remedial purpose of the laws against it, can also be seen in an earlier Title VII case, Gerndom v. Continental Airlines, Inc. In Gerndom, the majority on the Court of Appeals held that female flight attendants were entitled to a judgment of liability against the airline for firing or suspending them under a strict weight restriction program. Despite the fact that the weight requirements applied only to the all-female "flight hostesses" and not to the all-male "directors of passenger service," Kennedy joined the minority on the court in a dissenting opinion accepting as justification for this blatant sex discrimination the airline's excuse that it needed to offer passengers service by thin, attractive "girls."

To accept as a legitimate, non-discriminatory business reason in response to the plaintiffs' prima facie case of discrimination, the employer's excuse "that the degree of customer contact with flight

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Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc).

hostesses dictated that they maintain a more attractive appearance" is wholly unacceptable. One can only imagine the outcry which would ensue if the case had dealt with a job category that was all-Black rather than all-female and the dissent had accepted the employer's argument that customer preference dictated the hiring of only light-skinned Blacks. Yet women can be told that in order to hold a job they must be thin and, of course, attractive, and a judge holding such a view is considered a judicial "moderate."

Kennedy goes out of his way to interpret narrowly both substantive and procedural law to rule against plaintiffs in employment discrimination cases. For example, in White v. Washington Public Power Supply System, Kennedy reversed and remanded a $160,000 award to a Native American woman who sued her employer for race and sex discrimination. In his opinion remanding the case for a new trial because of the trial court's incorrect allocation of the burden of proof, Kennedy gratuitously added that Section 42 U.S.C. Sec. 1981 does not give any protection against sex discrimination. This narrow application of Section 1981 is contrary to decisions in other courts.

A second example is Koucky v. Department of Navy. In Koucky, Judge Kennedy authored the Court of Appeals opinion throwing out the discrimination claim of a handicapped former Navy man because he had named as defendant the Department of the Navy instead of the Secretary of the Navy. Saying that this meant the Secretary of the Navy had not had timely notice of the suit, Kennedy refused to allow the plaintiff to amend his pleadings, thus denying the man any opportunity to litigate his employment discrimination claim.

Our concern with Judge Kennedy's lack of commitment to eliminating employment discrimination extends to his own employment practices as an appellate court judge. Since Judge Kennedy's appointment to the Ninth Circuit Court of Appeals in 1975 he has had 35 law clerks. None has been Black; none has been Hispanic; only five have been women. During a time in which the percentage of women in law school has risen from 19.2% in 1975 to 40.4% in 1986, Kennedy has employed only 14.2% women law clerks. During the same period as the enrollment of Blacks rose from 4.5% to 5.9% and Hispanics from .3% to 1.9%, Kennedy hired 0% Blacks and Hispanics. Non-discriminatory hiring would be expected to result in the numbers of women, Blacks and Hispanics among Kennedy's law clerks being roughly proportional to their numbers in law school. Their grossly disproportionate exclusion creates an inference of discrimination and again reflects at best a total insensitivity to equal opportunity in employment, an insensitivity that we submit is underlined by his membership in clubs which practice discrimination.

SEGREGATED CLUB MEMBERSHIPS

Our concern over both the perception and the reality of Judge Kennedy's impartiality in discrimination cases and of his commitment to equality is intensified by his long-time memberships in clubs that exclude women and Blacks.

After twenty-five years' membership, Kennedy finally resigned from the Olympic Club on October 27, 1987. From 1958 through October 22, 1987, he also belonged to the Del Paso Country Club. In September 1980, after seventeen years' membership in the Sutter Club, Kennedy resigned. His membership in the Elks continued for fourteen years,

through March 1978.

All of these clubs are segregated by race or sex or both. Although he now professes to recognize that "real harm can result from membership exclusion regardless of its purported justification," Kennedy enjoyed the benefits of membership in these clubs for many long years.

When Kennedy joined the Olympic Club in 1962 it was restricted in membership to white men only. He remained a member of the club after the Board unanimously voted in February 1967 to retain its whites-only policy. Although the whites-only language was dropped the following year, the Olympic Club retains to this day a male-only requirement for membership under its bylaws and still does not have any Black members. We have also been advised that the Del Paso Country Club does not have any Black members.

Kennedy could not have been unaware of the problems raised by his discriminatory club memberships. As early as 1978, the American Bar Association had adopted policy that no ABA functions could be held in clubs which exclude women or minorities. In 1980, the U.S. Judicial Conference adopted a principle "that it is inappropriate for a judge to hold membership in an organization which practices invidious discrimination." The following year the U.S. Judicial Conference passed a resolution that the commentary to the Code of Judicial Conduct be amended to include this principle.

Although a member of the committee which recommended adoption of this principle by the Judicial Conference, unbelievably, Judge Kennedy continued to maintain his memberships in the Olympic and Del Paso Clubs

for more than seven and one half years more.

In August 1984, the principle that "it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin" was adopted by the ABA House of Delegates. Still Kennedy maintained his memberships in the Olympic and Del Paso Country Clubs.

In September 1986, the California Code of Judicial Conduct was amended to include the principle adopted by the ABA. In June 1987, the San Francisco City attorney warned the Olympic Club that its membership policies violated California's civil rights laws. Still, Kennedy maintained his membership.

Finally, in August 1987, twenty-five years after joining (and nearly seven and one-half years after the U.S. Judicial Conference adopted the principle that it was inappropriate for a judge to belong to invidiously discriminatory organizations), Kennedy wrote a single letter to the Olympic Club urging the club to change its male-only policy. He apparently never took any action to correct the de facto exclusion of Blacks.

Kennedy did not resign from the Del Paso Country Club until the day before Bork was defeated in the Senate, and he did not resign from the Olympic Club until four days later. The timing of his resignations from the Olympic and Del Paso Clubs cannot help but raise the impression of political expediency rather than principle. After enjoying the business and other benefits of membership in the Olympic Club, a single letter and a referenced conversation urging repeal of the bylaws restriction of membership to males hardly seems an adequate

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substitute for a genuine commitment to equality.

His attempts to define away the invidious discrimination of the Olympic Club against women and Blacks is not only offensive, but also gives rise to the question whether he would carry this narrow definition of invidious discrimination over to cases arising under the equal protection clause of the Constitution.

RIGHT TO PRIVACY

Lesbian and Gay Rights: Equally disturbing are the implications for the constitutional right to privacy found in Kennedy's opinion in Beller v. Middendorf. In that case, Kennedy approved as constitutional the Navy's policy of mandatory dismissal of lesbian and gay sailors with otherwise excellent service records. Although Kennedy conceded that there may be a constitutional right to privacy for lesbians and gay men, he overruled the individuals' right in these cases, citing the special needs of the armed forces.

However, even in the context of the military, limitations on individual constitutional rights should be drafted no more broadly than necessary to meet what Kennedy calls the "military necessities." In light of Kennedy's admission that the Navy's mandatory dismissal rule was "perhaps broader than necessary to accomplish some of its goals," we find it troubling that he saw no need to require the Navy to more carefully tailor alternative means of achieving its goals. Less restrictive means were clearly possible, since after the cases before Judge Kennedy arose, but before he wrote his opinion, the Navy had adopted narrower regulations permitting at least some flexibility in

dealing with the discharge of homosexuals.

Although he claimed to be mindful that the rule discharging the plaintiffs was a harsh one in the individual cases before him, Kennedy brushed this aside with a reference to the "relative impracticality" of regulations which would turn more specifically on the facts of each individual case.

In an earlier opinion, Singer v. U.S. Civil Service Commission, Kennedy had signed on to an opinion which allowed a gay activist to be dismissed from his EEOC job for being, according to the Civil Service Commission, "an advocate for a socially repugnant concept." The Supreme Court vacated the decision saying that an employee cannot be summarily discharged without some showing that his or her homosexual conduct is likely impair the efficiency of the Civil Service. The Singer reversal might well explain Kennedy's toned-down language in Beller v. Middendorf. However, the result is the same -- mandatory dismissal, irrespective of the ability to do the job required.

Abortion and Birth Control: Judge Kennedy has not ruled as a judge on the constitutional right to privacy in matters of birth control and abortion. Especially in light of the Supreme Court's 4-4 split decision affirming the appellate court decision in Hartigan v. Zbaraz, the importance of Judge Kenhedy's support for the constitutional right to safe, legal abortion and birth control, including access of minors and poor women to birth control and abortion, cannot be overstated.

Senator Jesse Helms has been quoted as saying that in his view Kennedy would look favorably on any case in which the court's earlier

decision legalizing abortion might be overturned. He is quoted as saying that "I am as certain as I can be without having heard him say 'I shall vote to reverse Roe v. Wade'...."

In light of his opinion in Beller v. Middendorf, the support of his confirmation by anti-abortion leader Helms and the now wide acceptance by right-to-life leaders that he is one of "theirs," we have serious question whether Kennedy would uphold a woman's right to privacy in birth control and abortion.

We do not find any comfort in Judge Kennedy's analysis in his speech "Unenumerated Rights and the Dictates of Judicial Restraint."

> [W]e must be careful about rhetoric and semantic categories in talking about fundamental rights. A helpful distinction is whether we are talking about essential rights in a just system or essential rights in our own constitutional system. Let me propose that the two are not coextensive. One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system. (At p. 13.)

Would Judge Kennedy, if confronted by Roe v. Wade, find that a woman's right to choose abortion is one of the "essential rights in our own constitutional system" or one of the unprotected "essential rights in a just system"? Would he find that the state has some compelling interest in preserving a fetus that outweighs a women's constitutional right to abortion? How broadly would he allow limitations on a woman's right to choose to be drafted to meet the perceived state need?

Roe v. Wade remains the law of the land, with former Justice Powell having voted in the majority to uphold it. To replace Justice Powell with someone who would vote to reverse Roe v. Wade or erode it

piecemeal over a period of time would be unconscionable.

The young woman who is little more than a child herself, the older woman who has an increased medical risk from pregnancy, the single mother with two or three children who is already stretched to her limits physically, financially and emotionally -- these women must have protection for their right to make responsible decisions about their own reproductive lives.

The chaos which would ensue if Roe v. Wade were reversed would rival that which resulted from Prohibition. We would see massive breaking of the law, since women would continue to seek abortions when the circumstances of their lives made it the right decision for them. Organized crime would again move back in to provide abortions, as they did before Roe v. Wade when millions of dollars filled their coffers every year. Rich women would once again fly to other countries for safe, legal abortions; middle-class women would seek out doctors in this country willing to disregard the law; and poor or very young women would once again be driven to back-alley butchers or to the extreme of self-abortion. Hospitals would again know "Saturday night massacres" when women with botched abortions, suffering from high fever due to infection or hemorrhaging profusely, would come in to save their lives, sometimes in vain.

We simply cannot afford to take the risk of having confirmed to the Supreme Court a justice who does not support the constitutional right of a woman to birth control and abortion. For women it is a bottom line question. It is our lives which are at stake.

ADDITIONAL AREAS OF CONCERN

Our belief that Judge Kennedy lacks a commitment to equality and justice is strengthened by Judge Kennedy's earlier opinions on school desegregation, voting rights and access to courts in fair housing cases. These cases reflect the same disregard for individual and civil rights seen in his later employment discrimination cases. They also reflect the same disturbing pattern, seen later in AFSCME v. Washington, of disregarding settled judicial principles which establish fact-finding as the duty of the trial judge.

School Desegregation: In Spangler v. Pasadena Board of Education, the Board of Education had requested the District Court to relinquish its continuing jurisdiction over a school desegregation plan. The District Court, at the urging of the Justice Department, found that the Board had been out of compliance with the court-approved desegregation plan on thirteen occasions and that recently-elected Board members had expressed their intent to revoke the desegregation plan and thereby to resegregate the schools. As a result, the trial court decided to retain continuing jurisdiction over the school district. The Appellate Court reversed. Judge Kennedy filed a lengthy concurring opinion. Sweeping aside the District Court findings, he said there was no evidence of intent to return to a dual system and voted to relinquish the court's continuing supervisory jurisdiction.

Voting Rights: In Aranda v. Van Sickle, Kennedy wrote a concurring opinion finding no illegal dilution of the Hispanic vote in an at-large election system. He reached this conclusion despite the

fact that in the city's entire 65-year history, this election system had resulted in the election of only three Hispanics to the City Council in a city which had grown to be 50% Hispanic. Kennedy concluded that there was no intent to dilute the Hispanic vote by maintaining the at-large system for elections. Although this effectively ended constitutional challenges to at-large elections within the Ninth Circuit, legislative challenges continued, and in 1982 Congress amended Section 2 of the Voting Rights Act to clarify that electoral practices which have a discriminatory effect are illegal, irrespective of the intent behind them.

Access to Courts: In TOPIC v. Circle Realty, Kennedy ruled against a fair housing organization and three individual home owners who brought suit against the racial steering practices of various real estate brokers. Although the trial court had upheld the plaintiffs' right to bring the suit, Judge Kennedy reversed and directed that the case be dismissed, stating that the plaintiffs had no standing. This view was squarely rejected three years later by the Supreme Court in an opinion written by Justice Powell, the justice Kennedy is proposed to replace.

CONCLUSION

On his record in Title VII cases, civil rights cases, his questionable support of the right to privacy, and in view of Judge Kennedy's own hiring practices and his life-long memberships in clubs which practice sexism and racism, we find him totally insensitive to the long struggle of women and minorities for equality in this country. Our society has made real progress, much of it through legislation

passed by Congress, in achieving a more just union. President Reagan and his Department of Justice have done much to obliterate that progress. He should not, and he must not, be allowed to place on the Supreme Court one who would continue that obliteration.

PI/ms

The CHAIRMAN. Thank you very much, Ms. Yard.

Mr. RAUH. I, too, have a written statement for the record.

The CHAIRMAN. The entire statement will be placed in the record.

Mr. RAUH. I have a deep respect for the Supreme Court, its role, its accomplishments.

I was the last law clerk to Justice Cardozo and the first law clerk to Justice Frankfurter.

I have enjoyed arguing for the Bill of Rights in front of the Supreme Court.

I have worked against putting someone on the Court who oughtn't to be there: Haynsworth, Carswell, Bork and Ginsburg.

Senator METZENBAUM. Would you pull the mike closer to you?

The CHAIRMAN. The microphone that works in this room is not the one with the wire on it; it's the other one.

Mr. RAUH. Thank you.

I think I have a somewhat deeper respect, most respectfully, than this committee has for the Supreme Court.

I think your performance has not been good. I think you have put these hearings on too soon, when people were not prepared, at a time when you cannot concentrate on it, when it is the end of the term.

I think you have not found out from the Justice Department what they know about this man.

I must say, and please don't—I have so many friends on the committee; please don't take this amiss—but I think you played patty cake with Judge Kennedy. I don't think you found out what he really thinks.

There is no reason you should not know what this professor of constitutional law, this judge, said at the time these great cases like *Roe* v. *Wade* came down.

We are not saying you should ask him what the results will be, what he will do in any case. But you have a right to know the views he expressed when those cases came down, and you never asked him. So he got away with generalizations.

Now, he talks a good game, but he does not play that game. His decisions, in *Aranda, TOPIC,* the *Pasadena* case, the one that Molly referred to, the *AFSCME* case, the *Gerdom* case, the *Beller* case, demonstrate that he will almost always take the side against rights.

It is nice to talk about how you are for rights. But it is nicer to rule for rights when the matter comes before you.

Now it is not clear what he is going to do. I am not here saying I know he is going to reverse *Roe* v. *Wade.* I do not know he is going to reverse school prayer. I do not know that. But you do not know that he is not going to reverse those and other cases.

On his record, he is more likely to be on the side of reversal, on the side of the four who presently would upset all these cases.

The tendencies we know, what we have seen, is that he is leaning the wrong way on the Bill of Rights.

I have devoted my life to the Bill of Rights and I can truthfully say that to me what you are doing is playing Russian roulette with it.

You are taking a frightening risk.

Now, if you want to say, well, the President has a right to take a risk with the Bill of Rights—in fact, he is on the other side on most of these issues—all right, say that.

But the Senate has a right, if it does not want those cases refought, if it does not want the Court to go against those cases, it has a right to say "no" to the President.

You have a right to say to the President of the United States, "no, we will not take somebody without a proven record in favor and in support of the Bill of Rights."

I think that is what you should do. Our difference here is really a philosophical one. You know this man has no record in support of the Bill of Rights. Every one of you knows that.

The question is, are you prepared to say, we have the right to reject on that ground?

The Constitutional Convention almost gave the Senate the full power of judicial appointments. They didn't, so there wouldn't be log rolling and cronyism and all that.

But you have equal power. And it ought to be used.

Thirdly and finally, I thought the testimony of the bar association this morning was almost ludicrous. They have not gone into the Judge's philosophy. Just remember, too, the bar association found well qualified a fellow named Haynsworth; a fellow named Carswell; a fellow named Bork; and they probably would have found for Ginsburg.

The bar association has never found against a single Supreme Court nominee. It is an automatic OK.

They do not speak for the public interest lawyers. They do not speak for the Mexican lawyers. They do not speak for the black lawyers. They do not speak for the women lawyers.

They speak for the corporate lawyers. And that is all they speak for.

I must say, there was one wonderful thing the ABA gentleman said this morning. Mr. Tyler, is another friend of mine, but I cannot help pointing out that he says that Judge Kennedy acted in a reasonable fashion—that is a quote—when he resigned from the segregated clubs.

He stayed in until about a month ago and that is the real point here. Senator Hatch made a terrible misstatement. I wish he were here.

Senator Hatch said——

The CHAIRMAN. You may bring him back.

Mr. RAUH. I would love to. Let me tell you what he said. I wrote it down.

He said that Judge Kennedy's name had not surfaced for the Supreme Court nomination when he wrote his letter in August of this year.

Judge Kennedy's name was on the list that was brought up here before Judge Bork was nominated. In other words, when in August Judge Kennedy resigned from that club, he was already a candidate for the Supreme Court.

The then nominee, Judge Bork, was in real trouble by August. I think to try to make it look like there was nothing wrong with Judge Kennedy's action is outrageous.

Molly Yard is more eloquent than I am. She told you what it means to women to be excluded from these clubs.

Even worse than that, Judge Kennedy sat by and let Senator Hatch make that absolutely 180 degrees wrong statement about his action, and did not correct it. I have a lot of things additional I would like to say, but I understand the problems of time. I see my light is on, sir.

[The statement of Joseph L. Rauh, Jr. follows:]

Testimony of

Joseph L. Rauh, Jr.

On Behalf Of

AMERICANS FOR DEMOCRATIC ACTION, INC.

On The

Nomination of Anthony Kennedy

SENATE JUDICIARY COMMITTEE

December, 1987

AMERICANS FOR DEMOCRATIC ACTION, INC.
Rep. Ted Weiss, President
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TESTIMONY OF JOSEPH L. RAUH, JR.

ON BEHALF OF AMERICANS FOR DEMOCRATIC ACTION, INC.

BEFORE THE SENATE JUDICIARY COMMITTEE

ON THE NOMINATION OF ANTHONY KENNEDY

Mr. Chairman, members of the Committee, I am Joseph L. Rauh, Jr., a founder, former national chairman, and presently a national vice president of Americans for Democratic Action, Inc. I have appeared before this Committee many times on behalf of the ADA. I have also appeared here often on behalf of the Leadership Conference on Civil Rights, of which I am counsel, but I am not acting in that capacity today.

On December 12, 1987, the ADA Executive Committee voted to oppose the confirmation of Anthony Kennedy as Associate Justice of the Supreme Court. We believe Judge Kennedy has not evidenced the devotion to the Bill of Rights that we deem the prime requisite for a member of the Supreme Court at this time. In that belief we urge the Committee and the full Senate to reject his nomination.

ADA and I have the deepest respect for the institution and role of the Supreme Court. I was Justice Benjamin Cardozo's last law clerk and Justice Felix Frankfurter's first. I have enjoyed arguing many times before the Court in support of the Bill of Rights and related subjects. And along with this view ADA and I have worked hard in opposition to the nominations of Judges Haynsworth, Carswell, Bork, and Ginsburg, whose records did not appear to measure up to those standards of the final arbiter of these very rights.

Most respectfully, Mr. Chairman, I believe I have a greater devotion to the Supreme Court than has been evidenced by the Committee in the confirmation process on this nomination. There has been woefully inadequate time (less than half the time between the Bork nomination and Hearing) for a comprehensive

study of the extensive record of Judge Kennedy -- his opinions, writings and statements. (It is for this reason that our analysis is less comprehensive than we would otherwise normally feel comfortable in submitting to the Committee.) This hearing is being held in the shadow of year-end adjournment when Senators' minds are quite naturally on last minute legislative problems of great concern to their constituents. Also, we unsuccessfully sought the opportunity to testify next month when Judge Kennedy's responses here could have been adequately digested and analyzed. Finally and most importantly, the Committee has failed to get from the Justice Department all the information available to the Department on Judge Kennedy's views on the issues that will likely come before the Court in the years ahead.

It is not too late for the Committee to act on this last point even now. For seven years this Administration has spared no effort to roll back the advances in civil freedom of the last quarter-century, most importantly to permit prayer in the schools, to ban abortion, to eliminate affirmative action and to dilute vital remedies needed for school desegregation. In furtherance of its roll-back effort, the Administration has sought constitutional amendments, statutes and court reversals -- largely without success. Now the Administration seeks, in a last ditch effort, to obtain a majority on the Supreme Court to accomplish at long last what it has been unable to do up to the present moment.

It is inconceivable that the Administration has made this nomination without knowing from Judge Kennedy, directly or indirectly, or from third parties, what the Judge's views are on the issues of primary interest to the Administration. This Committee, the full Senate, the press, and the public have a right to know what Mr. Meese and his colleagues know. It is up to the Committee to obtain that information from the Justice Department before it is too late.

I interpret the Senate's action in rejecting the Bork nomination as expressing the Senate's unwillingness to see the civil rights and civil liberties advances of recent decades refought at this time. Yet the confirmation of Judge Kennedy would open the door to just such a reconsideration of the past. Even in the short time available since his nomination, Judge Kennedy's insensibility to the Bill of Rights has been evidenced in at least six cases that have come to public notice. It is our considered opinion, given the record of this nominee that had he been the first choice, the battle which would have been waged by both the public and within this Committee would have been just as intense as Bork's.

A word about a number of Judge Kennedy's cases which concern us is appropriate:

* Aranda v. Van Sickle, 600 F. 2d 1267 (1979). In this case, Hispanic plaintiffs challenged at-large elections in San Fernando, California. Although only three Hispanics out of the large Hispanic population had ever been elected to the City Council in 61 years, Judge Kennedy's concurring opinion upholds at-large voting. The Judge even approved summary judgment against plaintiffs, riding roughshod over plaintiffs' allegations of long-time and widespread discrimination of all kinds against plaintiffs. No one who cared about the voting rights of Hispanics could have written that opinion.

* TOPIC v. Circle Realty, 532 F. 2d 1273 (1976). In this case, plaintiffs, individual homeowners and an organization supporting fair housing, sued under the Fair Housing law contending they were denied an integrated environment by real estate brokers steering customers along racial lines. Judge Kennedy, writing for the Court, dismissed the suit on standing grounds even though plaintiffs had enough of an interest in an integrated neighborhood

to act as testers and to sue on the basis of their testing results. Other federal courts ruled to the contrary as did the Supreme Court in an opinion written by Justice Powell, the man to whose seat Judge Kennedy aspires.

* Spangler v. Pasadena Board of Education, 611 F. 2d 1239 (1979). Here the issue was whether the District Court's order concerning school desegregation should be terminated. The District Court ruled in favor of retaining jurisdiction. But Judge Kennedy, in a concurring opinion, became a trier of facts without seeing the witnesses, overruled the District Court and terminated its supervisory jurisdiction. Contradicting the record, Judge Kennedy found there had been no showing of recent noncompliance with the District Court's order and he rejected plaintiffs' contention that school board members were seeking to return to a dual system; nor did he find it significant that school board members favored returning to neighborhood schools with its obvious resegregative effect. Judge Kennedy demonstrated here his insensitivity to school integration in an area that will require the attention of the Supreme Court in the years to come.

* AFSCME v. State of Washington, 770 F. 2d 1401 (1985). This case involves a claim that the wages paid by the State of Washington for jobs predominantly performed by women are sexually discriminatory and thus violate Title VII of the 1964 Civil Rights Act. The District Court so found. Judge Kennedy reversed on the ground that the State pays market rates. But there is no finding by the District Court that the State pays market rates; on the contrary, the District Court apparently resolved that issue in favor of the plaintiffs who introduced strong evidence that the State did not set wages on market rates. Again here, Judge Kennedy reached out for facts or assumptions to bolster a decision against civil rights -- in this case the rights of women.

This is, at best, insensitivity on an issue to come before the Supreme Court; at worst, it reflects deep-seated hostility to the ever growing demand for women's rights and against wage discrimination.

* Gerdom v. Continental Airlines, Inc., 692 F. 2d 602 (1982). Here the airline terminated flight hostesses above a certain weight in the interest of having only thin, attractive "girls" in passenger service. The weight limit did not apply to male employees, even "directors of passenger services." The Court, en banc, found this facially sex-discriminatory, but Judge Kennedy joined the dissent which held there was no disparate impact because flight hostesses were all females. What more could one do to show insensitivity to women's rights?

* Beller v. Middendorf, 632 F. 2d 788 (1980). This case involved a challenge to the Navy's rule requiring termination of homosexuals. Judge Kennedy upheld the Navy's ban on homosexuals because of military need without providing any substantial basis for those alleged military needs. The least that can be said of this opinion is that privacy is low on the Judge's order of priorities.

Judge Kennedy's insensitivity to the Bill of Rights evidenced in these and other cases is compounded by his continued membership over the years in private clubs which excluded blacks and women. He even continued his membership after the U.S. Judicial Conference adopted the principle "that it is inappropriate for a judge in an organization which practices invidious discrimination." The lame excuse he offered in his response to the questionnaire from this Committee was that exclusion on race or sex grounds is invidious only where "intended to impose a stigma" or resulted from "ill-will" only reinforces our

belief in the insensitivity of the nominee to the rights of all persons. For the Committee to ignore this behavior sends a most inappropriate message to the public and future nominees. You won't get the job if you quit smoking marijuana ten years ago but you will if you happen to quit a discriminatory club a month ago.

The issues before the Supreme Court today differ substantially from those in the 1930's when I was privileged to be a law clerk for the distinguished Justices I mentioned earlier. Then the significant questions centered around the constitutional validity of federal power to cope with the existing and future depressions, or in short, around the validity of the New Deal. Those issues have now been largely resolved. Today the great issues concern the rights of individuals and here the record of Judge Kennedy is too muddy for the Senate to risk his confirmation to this most important and pivotal position.

Judge Kennedy, yes and even Judge Bork, might have been acceptable risks on the Court with a majority clearly devoted to the Bill of Rights. Their differing views might well have sharpened the deliberations of such a Court. But a Supreme Court balanced four to four on the primary rights issues of the day (only this week the Court split four to four on an abortion issue) requires a ninth Justice who has evidenced clear devotion to the rights of all. Especially at a time when our nation is demanding that other countries respect human rights, we cannot afford to play Russian Roulette with our own dedication to the Bill of Rights. A vote for the confirmation of Judge Kennedy is a vote to take risks with the very fabric of our society.

It is for these reasons that ADA has taken this position. We are not so naive as to think our testimony alone will change the tide of this Committee or the entire Senate, but, having reviewed the record, we could not sit idly on

the sidelines and not come out in opposition. Both on principle and our sense of values, we urge this Committee to reject the nominee and force the President to submit the name of one of the thousands of distinguished lawyers who embrace whole heartedly the civil and constitutional rights of all Americans.

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The CHAIRMAN. We will give you plenty of time to beat up on us, Joe. You will have all day, if you want it.

Professor Ross.

Professor Ross. With some reluctance, we are present today to oppose the nomination of Judge Kennedy to the Supreme Court.

We recognize that in certain areas of constitutional and statutory rights, he has displayed some sensitivity. However, that has not characterized his approach to sex discrimination issues.

We fear that if Judge Kennedy's treatment of these issues were adopted, the court's precedents guaranteeing women's rights would be seriously undermined.

The positions Judge Kennedy has taken in a series of sex discrimination and employment cases raise serious questions about his respect for and adherence to Supreme Court precedent.

These cases involve situations in which women and men were exclusively and admittedly treated differently because of their sex.

In such cases, the Supreme Court has held that such sex based practices are discriminatory on their face, and has gone on to examine whether there might be a defense to such a policy.

In contrast, Judge Kennedy does not appear to recognize the existence of such facial sex discrimination, or its significance.

This leads him in turn not to find discrimination when the sex discrimination is clear cut.

We have related concerns about his interpretation of the meaning of intentional discrimination. Where facially sex based classifications are used, the Supreme Court has never sought to require any additional showing of intent.

As Justice O'Connor wrote in a 1982 case, because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause.

And as Justice Stevens wrote in a 1978 case, a policy which treats people differently simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of title VII.

It constitutes discriminations and is unlawful unless exempted by some affirmative justification.

In contrast, Judge Kennedy appears to want to apply some higher, more difficult standard of proving intentional discrimination based on sex, which would result in overturning most of the Supreme Court decisions finding sex based practices to violate the Equal Protection clause.

Finally, we are also very disturbed at Judge Kennedy's approach to the doctrine of disparate impact, a doctrine central to the effort to eradicate sex discrimination.

He has indicated discomfort with following the Supreme Court precedent in this area. And in a major wage discrimination case, he basically refused the apply the doctrine at all.

My written statement discusses in some detail cases in which Judge Kennedy has refused to find facially discriminatory practices directed against women to be discrimination.

I will briefly summarize the facts of some of those cases.

A facially discriminatory practice is the most obvious kind of discrimination, and the Supreme Court has repeatedly found that

facial discrimination is a per se violation of Section 703(a) of title VII.

The earliest example of that kind of Supreme Court decision was a 1971 case involving an employer that refused to hire mothers of preschool aged children while hiring fathers of preschool aged children.

Twelve years later, Judge Kennedy was faced with a similar employment policy. An airline required its flight hostesses to be thin or lose their jobs.

Men who also served passengers on the planes did not have to be thin.

The weight rule was quite strict. For example, a woman who was 5 feet 2 inches tall could weigh no more than 114 pounds dressed in a full uniform with her shoes on.

The airline fired or suspended many of the women for exceeding the weight limit. They fired not men, because the rule did not apply to men.

The court's majority found the airline's policy to be facial discrimination. Judge Kennedy did not.

Another 1982 case involved a Native American woman who claimed she suffered sex and race discrimination. She was awarded $161,000 after a full trial.

Her strongest evidence consisted of a statement by a supervisor that she was passed over for a clerical position because he wanted to hire a male in order to break up the female ghetto.

What was this but an admission that the supervisor refused to consider her for the job because she was a woman, not a male?

It was the strongest possible evidence that the decision was based on sex. Yet it was not strong enough to convince Judge Kennedy that she was a victim of sex discrimination.

He reversed the award and sent her back to the lower court.

A similar case came before him in 1984. A woman in training to be a police officer lost her job in the middle of training. After a full trial, the court ruled she was a victim of sex discrimination and awarded monetary relief.

The court found that she performed as well as the male trainees, yet was graded with lower scores than men whose performance was no better, and often worse than, hers.

Listen to the kinds of criticisms that the training officers leveled at her. One suggested that she was "too much like a woman." Another suggested that she try not to look "too much like a lady." Surely this evidence strongly suggested sex discrimination. Her performance was acceptable, but she was judged to act like a woman. The officer seemed to have preferred a man, someone who, by definition, would never act "too much like a woman." Yet Judge Kennedy reversed once more. Even the most obvious sex discrimination did not seem obvious to him.

Judged by how he applies doctrine to facts, Judge Kennedy is implicitly applying a narrow definition of discrimination, one never adopted by the Supreme Court. If so, that would explain why even facial discrimination does not seem like clear-cut discrimination to him.

The clearest indication of his thinking is found in his explanation to this committee of why, in his view, clubs with admitted poli-

cies of excluding women did not practice invidious discrimination. He explained that invidious discrimination suggests that the exclusion of particular individuals on the basis of their sex is intended to impose a stigma on such persons, and that the policy was not the result of ill will. In other words, the question of whether invidious discrimination has occurred turns not on the conduct but on the subjective state of mind of the discriminator.

Not a single Supreme Court decision on facial sex discrimination has required women who were attacking facial discrimination to show that the discriminators acted out of ill will or a desire to stigmatize women. And if that were the test, women would have lost most of the cases they had won before the Supreme Court. The court has accepted that most facially sex discriminatory statutes have been enacted to serve administrative convenience, to protect women, or to comply with a set of stereotypical views about the different roles in life that men and women should play.

I describe many of those cases in my statement. Let me just give you one example here. In the court's landmark *Craig* v. *Boren* decision in 1976, the court rules that the Oklahoma law barring males but not females from purchasing beer "invidiously discriminates against males 18 to 20 years of age." There was no discussion of ill will or stigma as to the males but, rather, an analysis of whether the sex-based classification was substantially related to achieving Oklahoma's traffic safety goals.

My third point today focuses on Judge Kennedy's refusal to apply the Supreme Court's disparate impact doctrine in a wage discrimination case. Disparate impact analysis is a very important doctrine in eliminating both sex and race discrimination and its more subtle but nevertheless devastating forms. It says that even when an employer takes apparently neutral action toward all workers, that action is illegal if it has a harsher impact on blacks than on whites, or on women than on men, if the employer cannot justify it with solid business reason. Judge Kennedy appears not to like the doctrine, having disparaged other judges who follow it in a speech where he said that "Those judges were gripped by the automatic rule syndrome." With this attitude, it is perhaps not surprising that he simply refused to apply the doctrine in the *AFSCME* v. *State of Washington* case.

In sum, Judge Kennedy has repeatedly failed to recognize and remedy even the simplest and most blatant sex discrimination cases. His record of enforcing title VII demonstrates that he does not recognize, despite strong precedent, that explicit sex-based discrimination is necessarily discrimination. He has developed a result-oriented analysis rejecting disparate impact cases that would undermine existing law. His judicial philosophy, taken together with his failure to adequately appreciate the existence of facial discrimination under title VII suggests that he may well undo anti-discrimination precedent with respect to sex if given the chance by setting new tests of ill will, malice or stigma—tests that will be impossible to meet in the sex discrimination context.

The questions we raise are so serious in their implications for how he would enforce the guarantees of equal rights for women that we urge you to call him back for further questioning. Will he recognize facial discrimination as discrimination? Will he adopt the

court's existing precedents on proof of intentional discrimination? Will he follow disparate impact doctrine?

Thank you.

[The statement of Professor Ross follows:]

NOW Legal Defense and Education Fund

STATEMENT OF

SUSAN DELLER ROSS,

PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

ON BEHALF OF THE

NOW LEGAL DEFENSE AND EDUCATION FUND

ON THE NOMINATION OF JUDGE ANTHONY M. KENNEDY

TO THE SUPREME COURT OF THE UNITED STATES

Committee on the Judiciary
United States Senate

December 15, 1987

NOW Legal Defense and Education Fund, 99 Hudson Street, New York, NY 10013 212/925-6635
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Introduction

With some reluctance, we are present today to oppose the nomination of Judge Kennedy to the Supreme Court. We recognize that in certain areas of constitutional and statutory rights he has displayed some sensitivity. However, that has not characterized his approach to sex discrimination issues. We fear that if Judge Kennedy's treatment of these issues were adopted, the Court's precedents guaranteeing women's rights under both the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964[1] would be seriously undermined. In these circumstances, we feel it is our duty--in Justice Marshall's recent words--to inform this Committee of our analysis of Judge Kennedy's views on sex discrimination issues.

We object to the nomination of Judge Kennedy on the ground, first, that the position he has taken in a series of sex discrimination in employment cases raise serious questions about his respect for and adherence to Supreme Court precedent. These cases involve situations in which women and men were explicitly and admittedly treated differently because of their sex. In such cases, the Supreme Court has held that such sex-based policies are discriminatory on their face and gone on to examine whether there might be a defense to such a policy. In contrast, Judge Kennedy does not appear to recognize the existence of such facial sex discrimination, or its significance. This leads him in turn

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1 42 U.S.C. §2000e et seq. (as amended).

not to find discrimination where the sex discrimination is clearcut.

We have related concerns about his interpretation of the meaning of "intentional" discrimination in both the Title VII, statutory context and under Equal Protection principles. Where facially sex-based classifications are used, the Supreme Court has never sought to require any additional showing of intent, either in statutory or constitutionally-based cases. As Justice O'Connor wrote in Mississippi University for Women v. Hogan, 458 U.S. 718, 723 (1982), "Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." And as Justice Stevens wrote in City of Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702, 711 (1978), a policy which treats people differently

> simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of [Title VII]. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for the person's sex would be different." It constitutes discrimination and is unlawful unless exempted by ... some ... affirmative justification.

In contrast, Judge Kennedy appears to want to apply some higher, more difficult standard of proving intentional discrimination based on sex. Indeed, the test he suggested to this Committee--looking for stigma or ill-will--in explaining why he had not resigned from clubs which had facial policies of excluding women is a test we believe would result in overturning

most of the Supreme Court decisions finding sex-based state laws to violate the Equal Protection Clause.[2]

Finally, we are also very disturbed by Judge Kennedy's approach to the doctrine of disparate impact in sex discrimination cases brought under Title VII. He has indicated discomfort with following the Supreme Court precedent on this doctrine; and in a major wage discrimination case he basically refused to apply the doctrine at all. Since the disparate impact doctrine is a concept central to the effort to eradicate sex discrimination, we are extremely concerned about Judge Kennedy's approach.[3]

Statement

Part I: Title VII Standards

Since the Supreme Court decided Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), its first Title VII case addressing an issue of sex discrimination, the law of the land has been clear that where an employer adopts an employment policy that applies only to employees of one sex, the policy is discriminatory on its face. In Phillips, the employer had a policy of refusing to employ women with preschool age children, a policy which the lower federal courts held did not discriminate on the

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2 Judge Kennedy's views on Title VII standards for examining intent are discussed in Part I of this testimony; his views on the Constitutional standards are examined in Part II.

3 Our remarks on this issue are in Part I of this statement.

basis of sex. The Supreme Court, unanimously and per curiam, reversed, explaining: "Section 703(a) of the Civil Rights Act of 1964[4] requires that persons of like qualifications be given employment opportunities regardless of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men--each having preschool aged children.[5]

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4 Section 703(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e - 2(a), provides that:

> It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge, any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

5 Once it is established that the employer has discriminated on the basis of sex (§ 703(a)), the employer is permitted to argue that the discrimination is justified (§703(e)). To do so, the employer must establish that sex is a "bona fide occupational qualification" (bfoq) for the job. This exception is a narrow one and the burden on the employer stringent indeed. See, e.g., Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985); Dothard v. Rawlinson, 433 U.S. 321 (1977); Diaz v. Pan American World Airways, Inc., 422 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971). In Phillips, the issue raised was what constituted discrimination for the purposes of 703(a), not whether the defense was established. As we shall show, it is on this initial question, resolved by the Supreme Court in 1971, that Judge Kennedy strays.

Phillips v. Martin Marietta is but one prominent example of a large body of case law sometimes referred to as "facial discrimination cases." These are the cases, many of which appeared in the early years after passage of Title VII, in which defendants explicitly used applicants' or employees' sex in some manner to affect employment decision-making. An employer may have, as in Phillips, applied an employment requirement only to members of the female sex. An employer may have admitted that he wanted a man for the job. Evidence may have been adduced that the employer or its agents explicitly used the employee's sex, rather than her actual job performance, as the basis for evaluating her job performance.

Facial discrimination cases are not difficult to adjudicate. As Phillips illustrates, the process of evaluating the question whether disparate treatment--that is, differential treatment based upon the employee's sex--has occurred, is simple. One simply asks whether the sexes are treated differently with respect to a shared characteristic (in Phillips, parenthood).

Most of the sex discrimination cases under Title VII in which Judge Kennedy has addressed the question of whether unlawful discrimination has occurred have presented "facial discrimination" issues and, in each such case, Judge Kennedy has undermined the principle that different treatment of the sexes should be considered sex discrimination, contrary to the analysis required by Phillips.

In Gerdom v. Continential Airlines, 692 F.2d 602 (9th Cir.

1982), Judge Kennedy ignored straightforward evidence of explicit sex-based treatment when he joined a dissenting opinion. At issue in Gerdom was Continental Airlines' policy that flight hostesses, all of whom were women, must meet certain weight requirements while men who also served passengers in-flight (albeit with different job titles) had no such requirement imposed on them. The weight policy for female employees "resulted in a loss of wages and employment only for women employees and it was never applied to male employees, even those who worked side by side with plaintiffs serving passengers on flights." 692 F.2d at 606. In the rehearing en banc in the Ninth Circuit, the majority held that flight hostesses who were suspended or terminated under the strict weight restrictions had been subjected to unlawful sex discrimination. The court then granted summary judgment to the flight attendants since the female-only policy was obviously sex-based and thus discriminatory. The court rejected Continental's attempt to justify the policy on the basis that it sought to compete with other airlines by featuring thin, attractive, female cabin attendants, stating that the justification was discriminatory on its face. The majority explained its reasoning:

> A facial examination of the weight program here reveals that it is designed to apply only to females. Where a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender, this court has held that the plaintiff need not otherwise establish the presence of discriminatory intent. [Citing among others Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982) aff'd 463 U.S. 1073 (1983)].... The fact

> that this policy applied to an intentionally all-female job classification does not alter the analysis.... By Continental's own admission, the policy was enforced only against women because it was not merely slenderness, but slenderness of female employees which Continental considered critical....
>
> The only justification that has been advanced for the weight program is Continental's desire to compete by featuring attractive cabin attendants. Subsumed in its assertion is the view that, to be attractive, a female may not exceed a fixed weight. Continental has never argued that all people, regardless of gender, are unattractive if they exceed fixed weight criteria. Nor has it suggested that the same competitive image would have been served by hiring thin males as well as females.
>
> The difficulty with the justification, therefore, is that it is not neutral. It is discriminatory on its face....

692 F.2d at 608-09. Under Phillips and its progeny, the majority analysis is clearly correct: a weight limit was placed on women that was not placed upon men, all of whom attended to passenger needs on Continental's flights.

A poorly-reasoned dissent rejected the majority's analysis that this was obvious facial discrimination; Judge Kennedy joined that dissent. The dissent argued, inter alia, that the disparate treatment claim required a trial on the merits since the airline's alleged justification for its facially discriminatory policy--that the degree of customer contact with flight hostesses dictated that they maintain a more attractive personal appearance--created an issue of fact concerning whether the weight requirement was based on sex or on customer contact needs.

The record already made it clear, however, that the men had customer contact but were not subjected to weight requirements; indeed, as the majority pointed out, the difficulty with the asserted neutral justification was that it was in fact sex-based, since Continental had only sought thin women, not thin men. Thus, the dissent in which Judge Kennedy joined avoided acknowledging the obvious sex discrimination in this case.

In White v. Washington Public Power Supply System, 692 F.2d 1256 (9th Cir. 1982), Judge Kennedy again refused to recognize the existence of obvious sex discrimination. There, Ms. White, a Native American woman, alleged that her employer had discriminated against her in initial hiring and in later opportunities for promotion based on her sex and race. At trial, the plaintiff's strongest evidence was "a statement by a supervisorial employer that she was passed over for a clerical position because he wanted to hire a minority male in order 'to break up a female ghetto'"--in other words, an admission that she was barred from consideration for the position because she was a woman, not a man. Additional evidence showed that women and minorities were underrepresented in the work force, and that White was more qualified than the persons hired for the jobs she sought.

The trial court found in favor of White and awarded her $161,000 in compensatory and punitive damages, back pay and attorneys' fees. On appeal, Judge Kennedy reversed and remanded. He relied on Texas Department of Community Affairs v. Burdine,

450 U.S. 248 (1981), which sets forth a prima facie case and shifting burdens of production of evidence from which courts can infer whether or not a policy is based on sex when there is no admission of a sex-based policy. Judge Kennedy reversed on the basis that the trial court had not assigned the correct burden of proof to the employer under Burdine.[6] In explaining why he thought a remand was necessary despite White's strong evidence of discrimination, Judge Kennedy stated: "While we do not hold that such evidence is insufficient to support liability, we do not think White's case so clear that the court's error in allocating the burden of proof can be disregarded." 692 F.2d at 1289.

In fact, if there was ever a case where the evidence was strong enough to avoid remand, this is such a case, with its overwhelming evidence of sex-based intent in the supervisor's desire "to break up a female ghetto" by hiring a "male." For inexplicable reasons, however, Judge Kennedy did not even discuss the supervisor's admission that he would not hire White because he wanted a man.[7] Under either the trial court standard or the Burdine standard, this was clearly sufficient evidence of sex-based discrimination.

In Fadhl v. Police Department, 741 F.2d 1163 (9th Cir. 1984)

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6 Although the trial judge orally applied the correct standard, his written opinion did not, and Judge Kennedy felt compelled to rely on the latter.

7 Judge Kennedy did discuss two other types of evidence about which there was room for argument, but he failed to discuss the clear evidence of sex-based discrimination which should have defeated the remand.

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Judge Kennedy again reversed and remanded a Title VII judgment and damage award of $86,000 to a female probationary police officer who was terminated in the middle of her field training program. The defendants' action had seemed clearly based on sex: one superior criticized plaintiff Fadhl for being "too much like a woman;" another said that she was "very ladylike at all times which in future may cause problems," and also suggested that she try not to look "too much like a lady." Yet a third stated that, "after work she can become feminine again." 741 F.2d at 1165. In addition to supervisors' statements of sex bias, there was evidence that the numerical evaluations given to Ms. Fadhl were lower than scores given to men whose performance was similar or worse, and that her scores did not correspond to guidelines that had been established for numerical evaluation. There was also evidence that Fadhl was denied certain training that the city admitted was necessary for success in the program. In short, the record was replete with evidence of sex-based discrimination against plaintiff Fadhl. While the Police Department did not explicitly admit that it wanted a man for the position, the comments of the three supervisors who were upset that Fadhl acted "like a woman", along with the other evidence, strongly suggested that the Department would have preferred a man--someone who, by definition, would never act "too much like a woman." Nonetheless, Judge Kennedy reversed and remanded for further consideration of the impact on the finding of liability of the trial court's erroneous finding that Ms. Fadhl was absent from

her departmental termination hearing. Given the exceptionally strong evidence of the Department's preference for policemen, it is extremely difficult to see how Fadhl's possible appearance at the hearing could have negated the finding of discrimination.[8]

Judge Kennedy later discussed this opinion in a speech before the management lawyers' group, Defense Research and Trial Lawyers Association. These remarks[9] suggest that evidence of clear sex-based evaluation of an employee will not be sufficient for a finding of liability to survive remand in Judge Kennedy's court. Something in excess of mere discrimination will be required. Although Judge Kennedy has not openly declared what he is looking for, his past statements suggest that he may well require discrimination plus hostility to sustain a finding of employer liability.[10] If so, this might explain why he appears

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8 Indeed on remand, the district court deleted the erroneous finding and reinstated its finding of discrimination--which was then affirmed on the second appeal to the Ninth Circuit by a panel on which Judge Kennedy was not sitting. Fadhl v. City and County of San Francisco, 804 F.2d 1097, 1098 (9th Cir. 1986).

9 He stated "There was ample evidence from which the district court could, and did, find discriminatory, if not hostile, attitudes toward her candidacy." See n. 10, infra.

10 That Judge Kennedy remanded both Fadhl and White despite his acknowledgement of the "ample," even "overwhelming" (in White) evidence of discrimination, strongly suggests that, either explicitly or implicitly, he requires proof of something more in order for the plaintiff to obtain relief. What precisely that "something more" is, is suggested by a variety of comments he has made in several different contexts. Taken together, these comments imply that Judge Kennedy believes, contrary to well-established precedent, that a plaintiff must produce some evidence that the defendant was motivated by hostility, in order for the discrimination to be actionable. As noted above, with respect to Fadhl, he stated, "There was ample evidence from which

(Footnote continued)

to ignore facial discrimination in a number of cases. In his speech, he also suggested that assessment of the amount of damages would be "a specific, measurable, substance, i.e. money, to demonstrate the merits of a particular position." Id. at 8. But, the amount awarded is not the measure of practical liability in Title VII. Unlike the garden variety tort case, the amount is not reflective of the trier's sense of outrage, since back pay and attorneys' fees are the only form of monetary liability that may be awarded. Moreover, to use monies as a measure of merit in a Title VII case would undermine the entire body of law which emphasizes the importance of non-monetary relief--in the form of declaratory and injunctive relief--in combatting discrimination. Further, this standard (assessing the merits of a case by the amount of money at stake) would undermine the Supreme Court's landmark sexual harassment decision, Meritor Savings Bank v. Vinson, 477 U.S. _____, 106 S.Ct. 2399 (1986), because the Supreme Court decided that the plaintiff (Vinson) had a valid

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10(continued)
the district court could, and did, find discriminatory, if not hostile, attitudes toward her candidacy." Kennedy Speech to Defense Research and Trial Lawyers Association at p.8. Yet, he remanded for further findings on whether the holding of liability was justified. When asked whether any of the clubs to which he has belonged practiced invidious discrimination, he responded that "[a]s far as [he] is aware, none of [the clubs'] policies or practices were the result of ill-will." Questionnaire at p.50. Finally, in AFSCME v. State of Washington, 770 F.2d 1401, 1407 (9th Cir. 1985), he wrote that, "The requirement of intent is linked at least in part to culpability." The content of Judge Kennedy's concept of "culpability" or "ill-will" and the degree to which be believes it is an essential element of a sex discrimination case, are questions that must be explored.

Title VII claim for the maintenance of a discriminatory work environment even if she could show no "economic harm," in the sense of lost wages or benefits.[11]

The theme of ignoring facial sex discrimination can be seen once again in Judge Kennedy's opinion in AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985). Plaintiffs charged that the State of Washington discriminated in compensation based on sex by paying predominantly female jobs about 20% less than predominantly male jobs where employees in both the male and female jobs had the same knowledge and skills, mental demands, accountability, and working conditions. In addition to documenting the pay disparity between men and women and the equivalence of their jobs, the plaintiffs put on evidence that the State of Washington had practiced facial sex discrimination for many years by barring women from some jobs and men from others, and advertising for jobs on that basis. Plaintiffs also presented expert witnesses who testified that facial sex segregation of this sort has a causal relationship with sex-based wage discrimination and often persists after the sex segregation has been discontinued. Judge Kennedy completely discounted the evidence of facial sex discrimination and its impact on wages, ruling that the official policy of sex-based job assignments did not "justify an inference of discriminatory motive by the State

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11 The claimed harassment in that case involved a concerted pattern of sexual harassment including brutal sexual attacks upon Ms. Vinson by a Vice President of the Bank, her supervisor.

in the setting of salaries" because individual plaintiffs had not testified, and because, in his view, the segregation consisted of "isolated incidents."[12]

In contrast, the Supreme Court has taken quite a different view of the conclusions to be drawn from evidence concerning other acts of discrimination by an employer in examining the acts alleged to be discriminatory in a pending lawsuit against the same employer. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973) the Court ruled that "statistics as to [the company's] employment policy and practice may be helpful to a determination of whether [the company's] refusal to rehire [the plaintiff] in this case conformed to a general pattern of discrimination against blacks." In other words, evidence that an employer practiced one form of race or sex-based discrimination can lead to the conclusion that the same employer was likewise motivated by race or sex in making another different employment decision. This has obvious relevance to the AFSCME case; if the state discriminated on the basis of sex in hiring and job assignments, that could well support the conclusion that it also discriminated on the basis of sex in setting wages.

Judge Kennedy's opinion in AFSCME is also troubling in two other respects--his interpretation of what is intentional discrimination, and his negative result-oriented examination of disparate impact analysis. The standard Judge Kennedy used in

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12 The trial court made no factual finding that the sex segregation was isolated.

AFSCME to analyze whether intentional discrimination was proven was not drawn from Title VII precedent, but rather from case law analyzing equal protection cases, where a heavier burden of proof is placed on plaintiffs. See, e.g., Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). Moreover, the standard he used was not appropriate for facially sex-based cases but was drawn from the one used for analyzing neutral policies; in such cases plaintiffs must meet a higher burden to show that the employer's policy was actually based on sex despite its neutral appearance. In AFSCME, Judge Kennedy quoted this higher standard as the appropriate Title VII standard without acknowledging that there is more than one standard. Thus, he ruled that "the plaintiff must show the employer chose the particular policy because of its effect on members of a protected class." Id., at 1405, quoting Personnel Administrator of Massachusetts v. Feeney, 442 U.S. at 279, and that, "discriminatory intent implies selection of a particular course of action at least in part 'because' of not merely 'in spite of', its adverse effects upon an identifiable group." Id. Judge Kennedy gave a passing nod to the less onerous Title VII standard drawn from the Supreme Court's opinion in International Brotherhood of Teamsters v. United States, 431 U.S. 325, 335 n.15 (1977) ("plaintiff must allege the employer 'treats some people less favorably than others because of their race, color, religion, sex, or national origin'"). However, his discussion of intent elsewhere in the opinion makes clear that he demands adherence to

a higher and more difficult standard than Teamsters requires. Thus, while he acknowledges that the Supreme Court allows an inference of intent to be drawn from statistical evidence, he also implies that the Court demands independent corroboration in addition to the statistics. In fact, the holding in Teamsters specifically allowed a prima facie case of intentional discrimination to be established based on statistics alone. Seen in this light, his AFSCME holding is doubly troubling--for it first erects a new and difficult standard requiring statistics to be corroborated by other evidence of discrimination, while concurrently dismissing highly probative evidence of long-standing facial sex discrimination as such corroboration.

With regard to disparate impact, Judge Kennedy's AFSCME opinion entirely rules out the possibility of disparate impact analysis applying to wage discrimination cases in any way. He argues that the two leading Supreme Court cases on disparate impact (Griggs v. Duke Power Co., 401 U.S. 424 (1971), a race case, and Dothard v. Rawlinson, 433 U.S. 321 (1977), a sex

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13 The rule of law in disparate impact cases under Title VII is that, where a plaintiff can show that a neutral employment policy or practice has a disparate impact on members of one protected group (women or racial minorities, for example), such proof is sufficient to prove unlawful discrimination unless the employer can meet the burden of proving that the policy or practice in question serves a genuine business necessity. See Dothard v. Rawlinson, 433 U.S. 321 (1977)(minimum height and weight requirement has disparate impact on women and is not justified by business necessity); Griggs v. Duke Power Co., 401 U.S. 424 (1971)(education and testing requirements having disparate impact on minorities insufficiently related to employer's job needs for manual labor jobs).

case)[13] require that disparate impact analysis be "confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process." Id. at 1405. But no such limitation can be found in these cases.[14] Indeed, the employment tests that were at issue in the landmark Griggs decision shared many of the characteristics of the wage-setting system in AFSCME that led Judge Kennedy to conclude that disparate impact analysis was inappropriate. Both the test and grading scale used for assessing candidates at Dukes Power Company and the final wage under the wage system implemented for Washington State employees involved "the assessment of a number of complex factors, not easily ascertainable" and were the result of complex deliberations on the part of each employer. Both the test and the wage system arrived at one quantifiable number (a grade or a wage), the impact of which on protected classes could be readily assessed using statistical measures. In short, Judge Kennedy analyzed the disparate impact doctrine in such a manner as to preclude its use in wage discrimination cases. Such a negative result-oriented analysis finds support neither in Supreme Court precedent nor in logic. But an explanation for Kennedy's position may be found in a speech he made to the Defense Research and Trial Lawyers

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14 Judge Kennedy's views in this regard also relied on Circuit Court cases which held that disparate impact analysis may not be applied to subjective employment practices. This view was recently rejected by the Ninth Circuit en banc in Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477 (9th Cir. 1987).

Association, when he suggested "[t]he rule, for instance, that a prima facie case of disparate impact is established by a comprehensive statistical case might be seized upon by a judge gripped by the automatic rule syndrome as an automatic, conclusive, simple way to resolve the case." These seem to be the remarks of someone who is less than comfortable with the doctrine.[15]

That his ruling on disparate impact was a result-oriented decision not based on precedent is also suggested by the way his decision supports the conservative consensus that sex-based wage differentials attributable in part to sex discriminatory market forces should not be actionable under Title VII. Again, however, Supreme Court precedent suggests otherwise. In Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974), the Court ruled on a

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15 In addition to the Title VII cases discussed above, Judge Kennedy joined, but did not write, four other Ninth Circuit decisions involving claims of sex discrimination under Title VII in which the lower court rendered summary judgment against the plaintiff. In none of these cases did he join a decision finding sex discrimination. In two of these cases, the court of appeals affirmed the summary judgment against the plaintiff. See LaBorde v. Regents of the University of California, 686 F.2d 715, rehearing and rehearing en banc denied, 686 F.2d 719 (9th Cir. 1982); Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977). In the two other cases, the Court of Appeals affirmed the summary judgment in part but found that genuine issues of material fact remained that, under Federal Rules of Civil Procedure 56, required trial on the merits with respect to certain issues. See Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982)(affirming dismissal of Equal Pay claim; reversing summary judgment on Title VII claim because issues of material fact remain); Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979)(reversing summary judgment concerning claims of sex discrimination and retaliation under Title VII because genuine issues of material fact remain; affirming summary judgment on Equal Pay claim).

sex-based pay disparity that "arose simply because men would not work at the low rates paid women inspectors." "[The disparity] reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."

Part II: Equal Protection Doctrine

Judge Kennedy has decided only two Equal Protection Clause cases involving sex discrimination and the analysis of the sex discrimination issues in them was cursory, at best. However, Judge Kennedy's performance in the Title VII cases involving facial discrimination and his judicial philosophy generally raise serious questions about whether he would apply existing equal protection doctrine to facial sex discrimination. In particular, we question whether he would require a new test for finding sex-based classifications unconstitutional--a test requiring that a plaintiff show the government was motivated by ill-will or hostility or a desire to impose a stigma upon one sex in adopting a sex-based classification.

Under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the Supreme Court has considered essentially two kinds of cases--cases involving an explicitly sex-based government policy and cases involving a purportedly neutral governmental practice that has harmful

effects on a protected class.[16] In the early 1970's, the Supreme Court adopted a heightened standard for judging the constitutionality of a governmental policy involving explicit sex-based treatment, although it did not settle on the final form of that heightened scrutiny until 1976. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality applies strict scrutiny)[17]; Reed v. Reed, 404 U.S. 71 (1971)(applying a

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16 In the case of a purportedly neutral practice having a harmful effect upon members of one class, the Supreme Court has required that a plaintiff show that the group-based effect was intended in the use of the purportedly neutral practice or procedure. See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976). This requirement of proof of intent in the equal protection cases where there is a challenge to a neutral rule or practice seems to have led Judge Kennedy to require special proof of "intent" in the form of ill-will even in cases involving explicit sex-based classifications. (Judge Kennedy applies such a standard in his discussion of the ABA standard of judicial conduct concerning membership in exclusionary clubs. See pp. 26-30 below. See also our discussion above of his imposition of this intent requirement governing neutral rules into a Title VII disparate treatment context--i.e, the AFSCME case.) But Judge Kennedy misconstrues the intent standards of Feeney. The "intent" required is not special hostility, but rather a showing that the conduct or policy in question was adopted with an intent to effect an unfavorable result based upon an individual's group membership, i.e., sex or race. With explicit sex-based classification, that intent is obvious.

17 In Frontiero v. Richardson, 411 U.S. 677 (1973) the Supreme Court invalidated a statute which automatically allowed certain fringe benefits to dependents of male members of the uniformed services, but required dependents of similarly situated service women to prove the status of their dependents, thus denying some women such benefits for their families. In so doing, the Court was deeply influenced by the historical reality that traditional "romantic paternalism" had served as a rationalization for relegating women to an inferior status. The Court held that the classification itself constituted unconstitutional discrimination in violation of the Due Process Clause of the Fifth Amendment, rejecting the government's rationale that the classification was justified and motivated by administrative convenience concerns.

heightened rationality test to strike down sex-based statute).[18] In 1976, the Court settled on an intermediate standard of review for sex-based classifications, in the case of Craig v. Boren, 429 U.S. 190 (1976). The Craig standard applies to a governmental law, regulation, rule or practice in which sex is explicitly used as a basis for classification. It provides that:

> [to] withstand constitutional challenge,... classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives. 429 U.S. at 197.

Under this test, the Supreme Court found that the Oklahoma statute at issue in Craig--making it unlawful for males, but not females, under the age of 21 to purchase 3.2% beer--"invidiously discriminates against males 18-20 years of age." Id. at 204. As in the prior cases, there was no discussion of ill-will or hostility directed toward males, but rather simply an analysis of whether the ban on boys purchasing beer was necessary in order for Oklahoma to achieve its traffic safety goals. Under the Craig analysis and the results in Reed and Frontiero, the Supreme

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18 In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court struck down a provision of a probate statute which required the automatic appointment of a male of a decedent's estate over a similarly situated female. That statute had not been enacted specifically in order to disadvantage women, but rather it reflected the policy that men had more business experience than women, and it was therefore rational to prefer men over women in designating the administrators of estates. The specific justification for preferring men was to save the courts time by automatic appointment of persons more likely to have business experience. The Court did not discuss intent in the holding, because the statute, on its face, created an impermissible sex-based classification subject to scrutiny under the Fourteenth Amendment.

Court has consistently struck down other laws explicitly using sex as a classification.[19]

For example, in Weinberger v. Wiesenfeld, 420 U.S. 636, (1975), a challenge to a federal statute allowing social security survivors' benefits only to women with minor children, the Supreme Court held that the statute was invidiously discriminatory on its face in violation of the Fifth Amendment guarantee of equal protection. Recognizing that the true purpose of this provision was to protect families by enabling widows to remain home and care for their children, id. at 644, the Court found that the "gender-based generalization" nevertheless operated to denigrate the efforts of wage-earning women and offended the Constitution. Id. at 645. There was no ill-will toward women intended in the statutory scheme, however; indeed, the government argued the statute was designed to help widows. In Stanton v. Stanton, 421 U.S. 7 (1975), the Court invalidated a state statute which set a greater age of majority for male dependents than for female dependants for purposes of terminating child support payments. The Court had no trouble concluding that Reed was controlling and that the arbitrary distinction denied women (the female children receiving child support) equal protection of the laws. Id. at 17. The presence or absence of

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19 The exceptions to this pattern occur where the Court has refused to strike down a statute because it was convinced that the use of gender classifications was adopted to redress "'our society's longstanding disparate treatment of women.'" See, Califano v. Webster, 430 U.S. 317 (1977); Kahn v. Shevin, 416 U.S. 351 (1974).

malice on the part of the Utah legislature was not of concern to the Court, since the classification was, on its face, irrational and discriminatory. Among the "old notions" on which the distinction was based was the idea that a boy's education must be ensured, while a girl was destined to marry and remain at home. Id. at 15. This was not a reflection of ill-will or malice, but just a remnant of the view that men and women should have different roles in society. In Califano v. Goldfarb, 430 U.S. 199 (1977), the Court struck down a gender-based classification which provided that survivor's benefits would be payable to a widower only upon showing that he "was receiving at least one-half of his support" from his deceased wife. A widow was not required, under the statute, to make such a showing. The Court held that Weinberger and Frontiero were controlling on the question of whether this distinction constituted an equal protection violation under the Fifth Amendment Due Process Clause. Far from finding that Congress was motivated by a desire to harm women when it struck down the statute, the Court held that its intention was to "aid the dependent spouses of decreased wage earners, coupled with a presumption that wives are usually dependent." Id. at 217.

In these and other cases addressing sex-based classifications in the law, the Supreme Court carefully analyzed the statutory purpose behind the sex-based classification, its importance, and whether the different treatment of men and women was really necessary in order to achieve the government's stated

purpose. In none of these cases did the court consider whether the government had been motivated by ill-will or hostility toward men or women, or whether it intended to stigmatize one group. Rather, the question was whether the governmental purpose was sufficiently important, and the sex-based classification really necessary to achieve this purpose. If not, the statute violated equal protection principles.

By contrast, in approximately the same time period as these cases, in United States v. Reiser, 532 F.2d 673 (9th Cir. 1976), Judge Kennedy joined a three paragraph per curiam decision upholding male-only registration for the draft. Without explanation or analysis, the opinion merely stated in the most conclusory terms that there was "a clear rational relationship between the government's legitimate interests, as expressed in the Act, and the classification by sex." 532 F.2d at 673. Whatever the appropriate outcome may have been, see Rostker v. Goldberg, 453 U.S. 57 (1981), the treatment of the equal protection question is troubling. The opinion used the lowest standard of review despite the fact that it came five years after the Supreme Court first applied heightened review in Reed v. Reed. Moreover, it in no way grappled with the nature of the governmental interest or the necessity for the sex-based classification.[20]

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20 Kennedy's other sex-based classification equal protection decision similarly exhibits a lack of the kind of analysis the Supreme Court undertakes in equal protection cases. The case was United States v. Smith, 574 F.2d 988 (9th Cir. 1978), cert.

(Footnote continued)

Judge Kennedy's refusal to recognize facial discrimination in Title VII cases casts doubt upon his willingness or ability to recognize the circumstances in which the Craig analysis (or for that matter Reed or Frontiero) should apply. More importantly, Judge Kennedy's apparent lack of concern for enforcing the clear dictates of Title VII raises questions about the position that he will take with respect to equal protection of the sexes under the Constitution. In his comments to the Ninth Circuit Judicial Conference on August 21, 1987, Judge Kennedy provided insight into his judicial philosophy on Constitutional analysis. He stated that he believed in the doctrine of "original intent," and

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20(continued)
denied, 439 U.S. 852 (1979), in which a statute resulting in harsher penalties for forcible sodomy of a man than for forcible rape of a women (presumably vaginal rape) was upheld against an equal protection challenge by the man convicted of sodomy. While the opinion started by quoting the Craig intermediate review standard, it ended by merely saying the two crimes were rationally distinguishable, without explaining what the governmental interest was in punishing sodomy more harshly than rape or why it was necessary to use a sex-based classification to achieve that purpose. Thus, Judge Kennedy's opinion stated:

> The physical abuses against the victim's anatomy committed in this case were acts distinct in kind from the act of rape as ... defined by common law. It is rational to determine that the harm, both physical and mental, suffered by victims of these two crimes are of a different quality, in each instance. These distinctions are reflected in traditions and community attitudes that have prevailed for centuries, and penal laws may properly take account of such differences by assigning a separate generic classification to each offense.

574 F.2d at 991. This analysis is merely the old rational review analysis, which results in automatically upholding a statute.

that this doctrine is "responsive" to some of his concerns "when you have spacious phrases like are contained in the Fourteenth Amendment [and] the answer in the text clearly is not there." Id. at p. 5. Judge Kennedy has also stated his belief that the Constitution is not the "panacea for every social ill", Speech to Sacramento Chapter of the Rotary Club, February, 1984, p.7, and that such ills should be rectified in the political arena. This philosophy raises substantial questions whether Judge Kennedy, as a sitting Supreme Court Justice, while giving lip service to the idea that the Constitution guarantees equal protection to women, will not apply the standard as rigorously as it has been applied by the existing Court.

Judge Kennedy's membership in discriminatory organizations, and his recent attempts to justify those actions, further reflect his misunderstanding of the basic concepts of discrimination and equal protection law. Over the past twenty-five years Judge Kennedy has belonged to clubs that specifically have excluded women as well as, in some cases, minorities. Most of those clubs have not only practiced this discrimination but have also incorporated their discriminatory policies directly into their by-laws. In other words, the policies of those clubs on their face discriminated against women and minorities.

Because these organizations had, or continue to have, policies which discriminate on their face,[21] there is no need for

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21 Judge Kennedy was appointed to the 9th Circuit in March, 1975. At that time he belonged to the Olympic and Sutter Clubs,
(Footnote continued)

further inquiry as to whether or not the organizations were or are discriminatory. Certainly were the equal protection doctrine or the prohibitions of Title VII to apply to such clubs[22] the answer would be clear that they had engaged in unlawful discrimination.

But in answer to questions posed to him by this Committee in

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both of which excluded women (See Judge Kennedy's Response to Senate Judiciary Committee Questionnaire, 47-48) and the Del Paso Country Club, which had no formal policy of exclusion but had no black and almost no female members. In March, 1980, the U.S. Judicial Conference adopted the principle "that it is inappropriate for a judge to hold membership in an organization which practices invidious discrimination." In September, 1980, Kennedy resigned from the Sutter Club. Id. at 45.

However, despite the August 1984 adoption by the ABA House of Delegates of a Commentary to Canon 2, ABA Code of Judicial Conduct, echoing the 1980 Judicial Conference principle, id. 49, and the September 1986 amendment of Canon 2, California Code of Judicial Conduct to state that same principle, Judge Kennedy continued his memberships with the Olympic and Del Paso Country Clubs until October 1987. He resigned from the Del Paso Country Club the day before Judge Bork's nomination to the Court was rejected by the Senate; he resigned from the Olympic Club three days after that defeat and two days before the nomination of Judge Ginsburg. Id. at 45-46.

22 Of course, equal protection doctrine applies only to governmental action and Title VII applies only to "employers" as defined by that statute. Challenges to clubs' exclusionary membership policies have been made under state and local antidiscrimination statutes--public accommodations or human rights laws--which usually adopt an analysis similar to that under Title VII. In litigation pursuant to state and local human rights or public accommodations laws concerning clubs having exclusionary policies, the question has not typically been whether such exclusion is "discrimination" but rather whether the club is properly covered by the antidiscrimination statute and, if so, whether the statute's coverage of the club is an unconstitutional infringement upon the freedom of association. See, e.g., Rotary Int'l v. Rotary Club of Duarte, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed 2d 474 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

this nomination process, Judge Kennedy constructs a new and additional standard for invidious discrimination to explain why these exclusionary policies are not discriminatory. He thereby attempts to excuse his membership in these organizations. In his response to this Committee's questionnaire, Judge Kennedy defines invidious discrimination as follows:

> "Invidious discrimination" suggests that the exclusion of particular individuals on the basis of their sex, race, religion or national origin is intended to impose a stigma on such persons.

Response of Judge Kennedy to Senate Judiciary Committee Questionnaire, p.50. In justifying why various club policies were not "invidious discrimination," Judge Kennedy also says they were not the result of "ill-will." Id.

If this definition of "invidious discrimination" were in fact the law, there would be virtually no actionable sex discrimination cases. Indeed, all of the equal protection cases discussed above would have been decided differently, since none of them were motivated by ill-will or an intent to stigmatize one sex. See Reed v. Reed; Frontiero v. Richardson; Weinberger v. Weisenfeld; Stanton v. Stanton; Califano v. Goldfarb. Most facially sex discriminatory statutes and policies have historically been enacted to "protect" women and have been rooted in sterotypical notions of taking care of the weaker sex rather than motivated by malice. With "ill-will" as the standard for liability, those discriminatory laws would still be with us today. Moreover, it is almost always impossible to determine the

exact internal state of mind or reasoning of any person, organization or group in adopting discriminatory practices. Judge Kennedy implicitly recognizes this in his answer to this Committee's questions. With regard to the policies of the Olympic Club he states:

> I was not involved in the club's decisions to limit membership and, consequently, do not feel competent to articulate the reasons for such restrictive policies.

Id. at 47. With regard to the Sacramento Elks Lodge #6's policies he provides the identical excuse. Id. at 49. How, then, can Judge Kennedy, using his incorrect standard for invidious discrimination, state with certainty that the discriminatory policies of these clubs were not based on ill-will and intended to impose a stigma? He cannot have it both ways.

The standard for discrimination articulated by Judge Kennedy is also at variance with the commentary to the ABA Code of Judicial Conduct, as amended in 1984, concerning membership in organizations that practice invidious discrimination. The ABA commentary expresses the concern and rationale for the standard, by stating that membership in such organizations "may give rise to perceptions by minorities, women and others, that the judge's impartiality is impaired." In other words, a judge should avoid any appearance of lack of impartiality. Judge Kennedy failed to do that by continuing to maintain membership in clubs having facially exclusionary policies that he now acknowledges could harm women or minorities or even result in stigma,[23] long after he took the bench and long after questions concerning such club

memberships had been raised in the ABA and before Congress. His justification for doing so in no way redeems his behavior but only serves to highlight his apparent lack of concern for eradicating sex discrimination or his lack of knowledge about Supreme Court jurisprudence on sex discrimination cases.

Conclusion

Judge Kennedy has repeatedly failed to recognize and remedy even the simplest and most blatant sex discrimination. His record of enforcing Title VII demonstrates that he does not recognize, despite strong precedent, that explicit sex-based discrimination is necessarily discrimination. He has taken the position that even where we recognize its occurrence it may be discounted. He has even suggested that it may be excused if it does not translate into cognizable monetary harm. He has developed a result-oriented analysis rejecting disparate impact cases that would undermine existing law. His judicial philosophy taken together with his failure to adequately appreciate the existence of facial discrimination under Title VII suggest that he may well undo constitutional equal protection doctrine with respect to sex if given the chance, by setting new tests of ill-will, malice, or stigma--tests it will be impossible to meet

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23 We understand that Judge Kennedy's recognition that stigma could result from facial exclusion came only in response to Senator Kennedy's questioning before this Committee, and not in his original written response to the Committee.

in the sex discrimination context. Finally, Judge Kennedy's analysis of the ABA standards of judicial conduct with respect to exclusionary clubs, in two of which he was a member until nearly the eve of these hearings, reflects the chilling reality that Judge Kennedy takes an aggressively apologist approach to the exclusionary practices, in effect arguing that such practices are not discriminatory. Such analysis is fundamentally inconsistent and flawed and flies in the face of any acceptable analysis of discrimination in existing law.

The testimony that we present here is necessarily limited, focusing only upon publicly available materials bearing on the nominee's thinking about sex-based equity. The hasty scheduling of these hearings has not afforded the time for an analysis of the nominee's judicial philosophy that would provide this Committee a precise understanding of the impact that confirmation of Judge Kennedy could have on decision-making by the highest court of this land in sex discrimination cases. The Committee has not even garnered all the materials that are reflective of the nominee's thinking. We urge you not only to hold the record open but also to continue the hearings at a later date, after this Committee has gathered all of the relevant materials on Judge Kennedy. Finally, we urge you to call him back for further questioning concerning the extent to which he will recognize facial discrimination as discrimination, and whether he will adopt the Court's existing precedents on proof of intentional discrimination and the use of disparate impact doctrine.

The CHAIRMAN. Thank you very much, Professor.

Mr. Levi.

Mr. LEVI. Thank you, Mr. Chairman. I want to thank you for the opportunity to testify before you today on the nomination of Judge Kennedy.

The CHAIRMAN. Welcome back.

Mr. LEVI. The National Gay and Lesbian Task Force is the nation's oldest and largest gay and lesbian civil rights advocacy organization representing the 10 percent of the American population that is lesbian and gay.

The gay and lesbian community seeks from a Supreme Court nominee——

The CHAIRMAN. Excuse me. Is that a membership, 10 percent of the population are members?

Mr. LEVI. No. Ten percent of the American population that is lesbian and gay.

The CHAIRMAN. You presume to speak for that 10 percent. They are not like NOW, for example, have actual members.

Mr. LEVI. We are a membership organization.

The CHAIRMAN. How many members do you have?

Mr. LEVI. We have 10,000 members, and we represent about a hundred local organizations around the country.

The CHAIRMAN. Thank you.

Mr. LEVI. The gay and lesbian community seeks from a Supreme Court nominee nothing more or less than other Americans: We seek a nominee committed to the concept that the rights contained in the Constitution are meant to be inclusive of all Americans, including gay and lesbian Americans. If there is one trend that is clear in modern American constitutional history, it is our continued expansion of the definition of groups and minorities who have come to be protected by the Constitution's umbrella.

Unfortunately, the Supreme Court still fails to include gay and lesbian Americans under that umbrella. The court and Judge Kennedy continue to deny us rights that most Americans take for granted. These rights include privacy in consensual, adult sexual expression as well as protections against simpler forms of discrimination from employment to child custody. This leaves gay and lesbian Americans as perhaps the last—and fairly large—minority lacking such constitutional protections. Our appeals for inclusion in the American constitutional family have been rejected at almost every turn, most dramatically last year in *Bowers* v. *Hardwick*. That decision affected privacy rights of gays and nongays alike in the half of the country that still has sodomy laws.

With that as a preface, we look to Judge Kennedy's record in hope of finding indication that his definition of American society and the Constitution is more inclusive. Unfortunately, little hope can be found. It can be said that Judge Kennedy has, over the last decade, repeatedly ruled to deny gays equality under the law.

Judge Kennedy supported exclusion of gay and lesbian service people from the military, deferring to the Defense Department's claim of the special circumstances of military life. He said this despite the fact that there is no evidence to suggest that gays are a security risk or in any other way less capable than their heterosexual counterparts to serve their country. The morale argument used

against gays in the military are painfully similar to those used 40 years ago to justify continued racial segregation in the armed forces. And Judge Kennedy bought those tired arguments.

Judge Kennedy has disagreed with other court decisions holding that government employees may not be fired because they are gay unless an adverse impact on job performance can be shown. He joined in denying former civil servants relief as a class even though they had been unconstitutionally fired because they were lesbian or gay. He also saw no constitutional protection for federal employees who were openly gay, thus seeking to relegate lesbians and gays to the closet. It seems that in Judge Kennedy's view it is all right for gays to be so—just as long as they do not tell anyone. Imagine saying that to other minorities, such as Jews. Such an opinion would then be seen for what it is—reducing a minority to second-class citizenship.

Finally, Judge Kennedy wrote an opinion in an immigration case that devalued the legitimacy of gay relationships in denying a hardship claim involving separation of life partners who happened to be gay. Judge Kennedy was, in effect, saying that gay relationships—simply because they involve persons of the same sex—are by definition less committed than those of heterosexuals, hardly a provable concept.

Time does not permit a consideration of Judge Kennedy's record toward other minorities—minorities of which gays and lesbians are also a part. But my colleagues on this panel and others will certainly address them adequately.

If this brief survey shows anything, it is that Judge Kennedy's record, at least toward one minority, has a far too narrow definition of the universe of Americans entitled to the rights guaranteed under the Constitution. His past opinions offer little hope to gays and lesbians challenging adverse treatment in the courts. Judge Kennedy's views may be expressed without the vitriolic rhetoric associated with Judge Bork, but his conclusions are the same. I ask that you examine Judge Kennedy's record by the same standard as you did Judge Bork's. If you do so, I think your conclusion will have to be the same: Judge Kennedy's notion of justice is too narrow for him to be worthy of a role as a final arbiter of the meaning of the U.S. Constitution.

Thank you.

[The statement of Mr. Levi follows:]

NATIONAL
NGLTF
GAY & LESBIAN
TASK FORCE

Testimony on the Nomination of
Judge Anthony Kennedy to the Supreme Court
Jeffrey Levi
Executive Director

Senate Judiciary Committee
Washington, DC
December 16, 1987

Mr. Chairman, members of the committee, I want to thank you for this opportunity to testify before you today on the nomination of Judge Anthony Kennedy to the Supreme Court. The National Gay and Lesbian Task Force is the nation's oldest and largest gay and lesbian civil rights advocacy organization representing the 10 percent of the American population that is lesbian and gay.

The gay and lesbian community seeks from a Supreme Court nominee nothing more or less than other Americans: we seek a nominee committed to the concept that the rights contained in the Constitution are meant to be inclusive of all Americans--including gay and lesbian Americans. If there is one trend that is clear in modern American constitutional history, it is our continued expansion of the definition of groups and minorities who have come to be protected by the Constitution's umbrella.

Unfortunately, the Court still fails to include gay and lesbian Americans under that umbrella. The Court and Judge Kennedy continue to deny us rights that most Americans take for granted. These rights include privacy in consensual, adult sexual expression as well as protections against simpler forms of discrimination--from employment to child custody. This leaves gay and lesbian Americans as perhaps the last--and fairly large--minority lacking such constitutional protections. Our appeals for inclusion in the American constitutional family have been rejected at almost every turn, most dramatically last year in Bowers v. Hardwick. That decision affected privacy rights of gays and nongays alike in the half of the country that still has sodomy laws.

With that as a preface, we look to Judge Kennedy's record in hope of finding indication that his definition of American society and the Constitution is more inclusive. Unfortunately, little hope can be found. My prepared statement contains an article by Professor Arthur Leonard that discusses in detail the relevant cases. But in sum, it can be said that Judge Kennedy has, over the last decade, repeatedly ruled to deny gays equality under the law.

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o Judge Kennedy supported exclusion of gay and lesbian service people from the military, deferring to the Defense Department's claim of the special circumstances of military life. He said this despite the fact that there is no evidence to suggest gays are a security risk or in any other way less capable than their heterosexual counterparts to serve their country. The morale argument used against gays in the military are painfully similar to those used forty years ago to justify continued racial segregation in the armed forces. And Judge Kennedy bought those tired arguments.

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Time does not permit a consideration of Judge Kennedy's record toward other minorities--minorities of which gays and lesbians are also a part. But I am sure other witnesses will address these concerns as well.

If this brief survey shows anything, it is that Judge Kennedy's record--at least toward one minority--has a far too narrow definition of the universe of Americans entitled to the rights guaranteed under the Constitution. His past opinions offer little hope to gays and lesbians challenging adverse treatment in the courts. Judge Kennedy's views may be expressed without the vitriolic rhetoric associated with Judge Bork, but his conclusions are the same. I ask that you examine Judge Kennedy's record by the same standard as you did Judge Bork's. If you do so, I think your conclusion will have to be the same: Judge Kennedy's notion of justice is too narrow for him to be worthy of a role as a final arbiter of the meaning of the U.S. Constitution.

Kennedy and the Gays, Again

When President Ronald Reagan announced his nomination of Judge Anthony M. Kennedy to fill the Supreme Court seat left vacant by Justice Lewis F. Powell, Jr., on Wednesday, November 11, I called the *Native* and asked how soon I would have to write something in order for us to have an article about Kennedy in the next week's paper. I was given a very short deadline, and quickly drafted the piece which appeared in *Native* 239, which focused on Kennedy's opinion for the Ninth Circuit Court of Appeals in *Beller v. Middendorf*, 632 F.2d 788 (Ninth Cir. 1980).

Write in haste, repent at leisure. When I read the November 13 issue of the *Washington Blade*, I realized further research was in order. Kennedy's record on gay legal issues is more involved (and more negative) than my earlier column indicated.

It seems that Kennedy wrote another, more recent opinion which is worse than *Beller*, *Sullivan v. Immigration and Naturalization Service*, 772 F.2d 609 (Ninth Cir. 1985). Furthermore, his anti-gay votes are recorded in two other cases where he was not the author of the court's opinion: *Singer v. U.S. Civil Service Commission*, 530 F.2d 247 (Ninth Cir. 1976); *Society for Individual Rights v. Hampton*, 528 F.2d 905 (Ninth Cir. 1975).

As you may recall, in *Beller* Kennedy held for a unanimous three judge panel that the Navy's policy of discharging homosexuals did not violate any constitutional provisions. While I disagreed with the decision, I observed that it was more narrowly focused and definitely less vitriolic than a similar opinion by Judge Robert Bork which had become the focus of gay opposition to Bork's confirmation, and even contained some signs that Kennedy might be open to finding constitutional protection for private consensual gay sex outside the military setting.

Having examined the other three opinions, I have to say that Kennedy seems rather obtuse on important gay issues, and indeed must be counted a likely vote against us on most matters likely to come before the Supreme Court. I'll take them in chronological order.

1. *Society for Individual Rights*. This case involved a challenge to Civil Service Commission regulations which excluded all homosexuals from federal employment. The trial court found the regulations unconstitutional and ordered the reinstatement of the gay man whose dismissal had stimulated the lawsuit. The Society for Individual Rights (SIR), a gay rights group which had brought the case on his behalf, also secured an order from the court barring the Commission from applying its anti-gay policy in the future, but the trial court refused to issue a broad order requiring reinstatement and back pay for all gays who had lost their government jobs in the past.

Both sides initially appealed the case. While the appeal was pending, however, reacting to a similar decision by the DC Circuit Court of Appeals, the Commission revised its regulations to end the anti-gay ban and withdrew its appeal. Thus, the only appeal before the Ninth Circuit panel in which Kennedy participated was that of the gay plaintiffs demanding reinstatement and back pay. Kennedy joined in a unanimous, unsigned opinion *denying* that relief, on the ground that such "class-type" relief would be of little practical value, since each individual claim of unlawful dismissal would have to be individually litigated to determine whether it came within the new regulations. The decision is essentially symbolic, but it indicates the panel's (and Kennedy's) unwillingness to grant even a symbolic victory to the gay litigants whose efforts had overturned the Commission's anti-gay policies.

(The *Blade*'s article misstates this holding, describing it as a positive ruling by the Ninth Circuit in support of the reinstatement of the gay man who initially brought the case. But the court's opinion clearly states that it is not dealing with that issue in any way, since the government had withdrawn its appeal.)

2. *Singer v. U.S. Civil Service Commission*. At about the same time as the *SIR* case, John Singer, a gay activist employed as a clerk at the Equal Employment Opportunity Commission in Seattle, was battling to keep his job. Unlike past gay litigants who were dismissed from government employment after being entrapped by plainclothes cops in public restrooms or cruising areas, Singer was dismissed because he acted as if being openly gay was a normal state of affairs; he would kiss other men in public, dress and behave according to his own "gay sensibility" at the office, and even applied for a marriage license with his boyfriend, resulting in a local media spectacle that ended up in the Washington State Supreme Court.

Singer challenged his dismissal within the Civil Service appeals system and then in a federal district court in Washington State, losing at every turn. In essence, the Commission took the position that he was not discharged for being a homosexual, but rather for acting gay publicly. As far as the Commission was concerned, even under the new regulations which precluded discharging somebody just for being homosexual it could still discharge somebody who acted "gay," because having openly gay employees around would "impair the efficiency of the federal service." (Shall we play a game of 20 questions about the so-called "efficiency" of the federal service? Sorry about that to any gay readers who work in the federal service, those of you whom I know personally have told me plenty of stories that would justify maligning the "efficiency" of the service at every opportunity.)

Kennedy was part of a three judge panel which rejected Singer's claim, although Kennedy did not write the opinion. The panel, in an opinion by W. J. Jameson, a senior district judge from Montana who was spending his vacation on the coast hearing cases in the Ninth Circuit, merely restated the Commission's argument that "open and public flaunting or advocacy of homosexual conduct" deserved no constitutional protection. That is, you can be a gay federal employee so long as nobody in the public knows about it! Singer appealed to the Supreme Court, which vacated the panel's decision for reconsideration in light of new regulations which had been announced by the Commission during the pendency of the case.

3. *Sullivan*. Kennedy wrote the opinion for a three judge panel, with Circuit Judge Pregerson filing a spirited dissent. This was part of the famous saga of Anthony Sullivan, an Australian, and Richard Adams, his Filipino-American lover. Sullivan, in the U.S. legally as a student during the early 1970s, met Adams, fell in love, and managed to obtain a marriage license from a maverick town clerk in Colorado in 1975. A minister performed a marriage ceremony for them, and then they began their campaign at the Immigration and Naturalization Service (INS) to get Sullivan permanent status in the U.S. based on his marriage to an American citizen. The INS was not buying this marriage, however, and the Ninth Circuit agreed with them, in an earlier opinion in which Kennedy did not participate.

Then the INS brought deportation proceedings against Sullivan, who had long overstayed his student visa. Sullivan claimed he should be allowed to stay in the country on account of extreme hardship. He argued that Australia was unlikely to allow his lover, Adams, to immigrate there. Sullivan also pointed out that there was much open homophobia in Australia, so it was likely that he, an internationally notorious gay activist as a result of his legal battles with INS (which had been reported in the Australian press) was unlikely to receive a friendly reception in the land of his birth. He

- [illegible] AND THE GAY AGAIN continued

expected to encounter discrimination in seeking work, and had already been totally rejected by family and former friends, retaining no personal ties to Australia.

Judge Kennedy rejected all Sullivan's arguments. Quoting long sections of the obtuse opinion by the Board of Immigration Appeals, which characterized Sullivan's alleged hardships as being no different from those suffered by other deportees, Kennedy asserted that Sullivan had failed to demonstrate any "special hardship" that would distinguish his case from others.

Judge Pregerson's dissent expressed outrage at this farce. Pregerson noted that neither the Board nor Kennedy had taken any notice of the peculiar difference between Sullivan's case and all the others they relied upon. None of those other cases involved gay people, gay life partners, or the kind of notoriety alleged by Sullivan. He accused the majority of ignoring "the rule that each hardship case must be decided on its own facts."

The story has a sort of happy ending. After a farewell interview on the *Donahue* show, Sullivan and Adams left to wander the world, seeking a home port. At about that time, Australia announced that it would permit immigration of gay lovers of Australian nationals! Looks like, in this instance, Australia, rather than America, is the land of the free.

Toting it all up, I would say that Kennedy is no friend of gay rights, and while he does not seem the activist ogre that Bork was in *Dronenburg v. Zech*, his appointment should come as no cause for joy among gay people. At the same time, it seems unlikely that gays alone can block his confirmation, and equally unlikely that Ronald Reagan would appoint anyone who would have voted differently in any of these cases. In this regard, a look at the 1987 Supreme Court term, and in particular now-retired Justice Powell's voting patterns, may be illuminating.

Each year in its November issue, the *Harvard Law Review* publishes a statistical analysis of the previous Supreme Court term. The November 1987 *Review* has just been published, and the statistics are quite revealing. Assuming that voting in accord with Chief Justice William H. Rehnquist makes one a conservative (some would say "of the far right") and voting with Associate Justice Thurgood Marshall makes one a liberal (others might say "of the far left"), how does Powell fare?

Powell agreed with Rehnquist on 86% of the votes, more than with any other member of the Court, including conservatives Antonin Scalia and Sandra Day O'Connor. He agreed least often, 55% of the time, with Marshall. This confirms what I said in my previous columns on this issue, including the first column on Bork during the summer: Powell was a *very conservative* Justice.

The statistics overall appear to me to show the following lineup from right to left (this is, of course, vastly oversimplifying things, since not all cases divide up along such political lines): Scalia is most conservative, followed by Rehnquist, Byron White, O'Connor, and Powell. Justice John Paul Stevens plays things very much down the middle, while Justice Harry Blackmun agrees with Justices William J. Brennan and Marshall a bit more than he does with Stevens, placing him just a bit to the left of center.

In the 45 cases where the Court was most closely divided, voting 5-4, Powell joined a basically conservative majority 25 times out of the 45. In seven cases, he provided the decisive fifth vote for the liberal-moderate group. In the remaining close cases, it was usually White or Stevens who "switched sides" to vote apart from their normal "bloc," although virtually every justice found him or herself with some strange bedfellows on a case or two. Perhaps the most interesting example of this is Justice O'Connor's dissent in the Gay Olympics case (a 5-4 case, in which we lost Powell and Stevens). It may be that O'Connor will be receptive to future arguments in favor of equal protection treatment for gays.

Another technical correction on my previous column about Judge Kennedy: I inadvertently omitted Alaska and Hawaii from the list of states covered by the Ninth Circuit Court of Appeals, the court on which he presently sits. *Mea culpa*. ■

THE LAW

by Arthur S. Leonard

FROM: New York Native
December 7, 1987

The CHAIRMAN. Thank you.

Ms. YARD. Mr. Chairman, I made a grievous omission. Can I correct my opening?

The CHAIRMAN. Certainly.

Ms. YARD. I spoke on behalf of the National Organization for Women, which is a membership organization of women and men, but I also am here on behalf of the National Women's Political Caucus, who joins us in opposing the confirmation of Judge Kennedy.

The CHAIRMAN. Thank you for that clarification.

We are, on our first round, going to limit ourselves to 5 minutes. I have an umber of questions. To the extent you can help me keep within my 5 minutes, I would appreciate it very much.

Professor, did you find any solace at all—and I, quite frankly, am most disturbed by the flight attendant decision. That one I find—I do not know how you explain that one.

But did you find any solace, when Judge Kennedy was pressed on what standard that he would seek to apply in making decisions based on gender discrimination? He indicated that he wanted a higher scrutiny standard, and he said although he was not sure—correct me, if your recollection is different, and my staff I ask to correct me—somewhere between Marshall's sliding scale and the existing standard that has been used by the Court, and the majority of the Court.

What did you read from that, if anything?

Professor Ross. My concern is how a standard is applied, not the standard that is articulated. I think it is easy to articulate a given standard. The difficult and tough question comes up when you look at how somebody applies it.

It happens that he has written a couple of minor equal-protection decisions which are cited, and discussed very briefly in my longer, written statement.

The thing that struck me, in looking at those, is that they did not exhibit a thorough kind of analysis, and the second one is a rather peculiar situation where the challenge was to a criminal statute which resulted in heavier penalty for rape of a man than for rape of a woman.

He cited the——

The CHAIRMAN. The heavier penalty for the rape of a man rather than the rape of a woman?

Professor Ross. Yes. That is right. That is right. It was challenged, and he upheld the distinction. I found his reasoning a little difficult to understand. He seemed to be implying that it was more painful or traumatic for a man to be raped than for a woman to be, and so that was the justification. He cited——

The CHAIRMAN. And that case is cited in your statement?

Professor Ross. Yes. It is. It is *U.S.* v. *Smith.* And he started by citing the language from *Craig* v. *Boren,* but if you look at the concluding paragraph—it is not a very long excerpt—he is really using rational relationship language.

He is saying that there is a rational distinction between the two forms of rape. He does not really explain why it necessary to have a sex-based classification.

So my concern would be, how does he really apply it? And that is the question that I have, too, in terms of the other sex-discrimination cases that we have looked at. There is verbal adherence to the correct standards, but when you look at how it has actually been applied, he justifies obvious sex discrimination.

The CHAIRMAN. Based on what you have read—and I presume you have read all his speeches, and a number of his cases—obviously you will not know the answer to this but I would like your professional judgment as to what you think would be the outcome.

Do you have a sense of how he would rule on *Roe* v. *Wade*, a similar case, if it came before the Court?

Professor ROSS. I am afraid I have no sense at all of that.

The CHAIRMAN. Neither do I. You have provided me no solace, which takes me now to Mr. Rauh.

Mr. Rauh, you seem to be suggesting that—and you may be right—that none of us should vote for any Justice with whom we have any doubt about how he would rule, or she would rule on the case.

In other words, in *Roe* v. *Wade*, unless I was certain that he would not vote to overrule *Roe* v. *Wade*, are you suggesting that members of this committee should therefore not vote for the Justice? Is that what you mean by "Russian roulette"?

Mr. RAUH. No. I do not mean that, Senator, and I am sorry that I did not make myself clear enough. I believe you should not vote for anybody who has not demonstrated support for the Bill of Rights.

You cannot have certainty on how a person is going to go on a particular case. But you can satisfy yourself, Senator, that you have someone before you who has demonstrated that support, who has done things in this world for rights, who has stood up in court and argued for the Bill of Rights, who, as a judge, in the lower courts, argued for the Bill of Rights.

I am saying there should be some demonstrated support for the Bill of Rights. Then you can take your chances. You are not going to get certitude, but it is Russian roulette——

The CHAIRMAN. And what part of the Bill of Rights do you have uncertainty about with regard to Mr. Kennedy?

Mr. RAUH. I have uncertainty on the three great current issues, and I would like to give two reasons why I have that uncertainty. First, let me say what I think we all agree are the three greatest issues before the Supreme Court. Number one, of course, is *Roe* v. *Wade*. Number two is separation of church and State. Number three is affirmative action and school desegregation.

Those are the three areas where you have a four to four split, and where Judge Kennedy is going to be the deciding factor—where Justice Powell was the deciding factor for the Bill of Rights.

Now those are the areas on which I would think you should assure yourself, because they are the——

The CHAIRMAN. And that is, you would have to know the answer to——

Mr. RAUH. No, sir. You have to have somebody who has spoken out for civil rights. Who has done something for civil rights in the courts as a lawyer. Who has done something for civil rights as a judge. There are thousands, literally thousands of lawyers in this

country—black, white, brown, everything—who would meet this test.

The CHAIRMAN. Are you saying there are people who have done something for civil rights who could be against affirmative action?

Mr. RAUH. There are people like that, certainly.

The CHAIRMAN. And there are people who have done something for women who could be against *Roe* v. *Wade*. Is that what you are saying?

Mr. RAUH. That could be true, although it is an unlikely event.

The CHAIRMAN. Aren't you playing games with me, Mr. Rauh? Aren't you really saying——

Mr. RAUH. On the contrary. I am very serious. And I think the standard, as I stated it in my prepared statement should be: "Judge Kennedy has not evidenced a devotion to the Bill of Rights that we deem the prime requisite for a member of the Supreme Court at this time."

The CHAIRMAN. And you have just defined that in terms of issues. You defined it in terms of *Roe* v. *Wade*, you defined it in terms of affirmative action, and you defined it terms of—what was the third issue?—separation of church and State.

Mr. RAUH. It is not that it is defined in those terms. Support for the Bill of Rights covers literally hundreds of different things, but these are the three areas where the Supreme Court is balanced, and therefore, you should want some assurance on them. I think you could have——

The CHAIRMAN. Assurance on what? The outcome?

Mr. RAUH. No. You are not giving me a chance to make it clear, and it is a difficult concept. The concept is that the nominee should be someone who has shown clear support for the Bill of Rights. I do not care where he has shown it. He might have shown it in some area involving the Japanese—on the internment—for example. I do not care where he showed it. If a person has shown some devotion for civil rights, I think you could then very well say we are confident in the other areas of civil rights.

Second, let me make this point because I think it is so clear. It is not guilt by association to say that the Justice Department has spent 7 years trying to reverse the Supreme Court in the three areas that I have mentioned where the court is balanced 4 to 4.

Don't tell me they do not know where Judge Kennedy stands. This is their last-ditch effort to reverse the Supreme Court's decisions. I think they know more about him than you know. I think this was a failure on your part. I want to second the suggestion of Professor Ross, that he be called back for some real questioning on this. The job has not been finished.

The CHAIRMAN. I asked him under oath, in great detail, about what commitments he had made, what questions had been asked.

Mr. RAUH. Oh, nobody is suggesting he made commitments. You do not make commitments in this world before going on a court. I am not suggesting he made commitments to the Justice Department.

I simply think they know how he feels, and I think you could have——

The CHAIRMAN. How would they know how he feels?

Mr. RAUH. By the various people they have spoken to. And I think you could have found out, not how he would vote, but how he feels, by asking him what he said when these cases came down. He is a man who lives in the constitutional field. He lives in that field as much as the Senators up here.

All of you live in that field. I will bet every one of you commented on all these cases when they came down. I will bet Judge Kennedy talked to people about these cases when they came down.

I think you ought to know what he said then. I think we ought to know. I think the public ought to know.

Professor Ross. If I could just add a note, I understand he did not turn over his teaching notes from constitutional law courses, and I would imagine there might be some very interesting explanations of his views in those notes.

Ms. YARD. I would also like to add another note. We know very well—you know better than I do—that Senator Helms has one issue on which he will not give an inch, and he is obviously satisfied with Judge Kennedy, and if you read the newspaper clips, which I do from all over the country on this whole subject, it is well established that the right-to-life people are convinced that he is one of theirs. All you have to do is read what they are saying.

The CHAIRMAN. So the fact that they are convinced is evidence that we should be against?

Ms. YARD. I am very worried about what it means, and we are talking about women's lives, and it is not a laughing matter.

The CHAIRMAN. I understand. I am not laughing. No one else is laughing. I just want to make sure I understand exactly what you are saying, and what you are saying——

Ms. YARD. Well, I cannot prove what he said to Jesse Helms. Neither can you. He said he did not say——

The CHAIRMAN. Let me ask you another question. Do either of you, or Mr. Rauh, think there is any possibility you could be for any judge that would be sent up by this administration?

Ms. YARD. Well, you know, lightening might strike. They might nominate Barbara Jordan. I would sure be for her. I mean, who knows?

Mr. RAUH. I would like to answer that. The answer is that if this committee, and the Senate, were to make clear they will not confirm someone who has not shown a dedicated support for the Bill of Rights, you will either have a choice next year, or they will send up somebody who will meet that qualification.

Don't forget that President Nixon did that, after we had defeated——

The CHAIRMAN. That is a fine role model to follow.

Mr. RAUH. Well, it is a role model that I would not ordinarily propose, but it seems to me to be appropriate here. After Haynsworth and Carswell were beaten, President Nixon sent up a man who, on the eighth circuit, had evidenced great support for the Bill of Rights in a number of cases. There was no opposition to the judge in that third——

The CHAIRMAN. Who was that?

Ms. YARD. Blackmun.

Mr. RAUH. Judge Blackmun who ultimately wrote the great *Roe* v. *Wade* case. We did not oppose him. What we did was declare a victory because he was obviously pro Bill of Rights.

The CHAIRMAN. He was a member of the Cosmos Club, wasn't he?

Mr. RAUH. I have no idea.

The CHAIRMAN. He was.

Mr. RAUH. And the clubs were not quite the issue in 1970 that they are today.

The CHAIRMAN. That is a good point you just made. I am way over my time. I yield.

Senator SIMPSON. We could yield you some time from the senior Senator from South Carolina, if you would like a little more.

The CHAIRMAN. No. I think he is coming back to question Mr. Levi.

Senator SIMPSON. I would be glad to let you continue. I am fascinated by it, and I mean that. I think it is, you know, good——

The CHAIRMAN. No. I have many questions. I will come back. I yield.

Senator SIMPSON. Well, thank you, Mr. Chairman. I suppose it would have been a good time to duck, and let the chairman take all the lumps, but I am not going to let that happen.

The CHAIRMAN. Please don't help me too much, Alan. [Laughter.]

Senator SIMPSON. I know, Joe. Just relax. It is all right. You can just feel comfortable now. Just settle down. Don't let the meter run, though.

Anyway, to say that the Chairman has not been fair, and that somehow he has played "pattycake"—and that was the phrase—with this exercise, is just absurd, and it is offensive to me.

The reason it has not come to pass, I guess, like some of you would like it to come to pass, is that the digging has actually been done, but the diggers broke their pick during the last mother lode, and they cannot get it sharpened up again. It will not work. It is fascinating to watch.

I believe the Chairman is absolutely right. There is not any nominee that is going to pass your test, that comes out of this President. Why don't we just get right down to honesty on this one, at least from these two witnesses.

And to say that we should wait for the Justice Department, Mr. Rauh—and I have the greatest respect for you. I have been reading your material since I was a young lawyer in Cody, Wyoming—to say you want the Justice Department to enter in here before we go further, with some of the things you have said about Ed Meese and the Justice Department, is the "chuckle deluxe" of the whole year.

I mean, it has got to make you just gasp, and pitch forward on your ear.

Now, apparently Justice Stevens did not pass the test, O'Connor did not pass the test, Scalia did not pass the test, Rehnquist did not pass the test, and yet they are on the bench. Yes, they all are.

And so here we are, getting back to things about Rosa Parks, and the back of the bus, and into the kitchen, and *Roe* v. *Wade*. Wait a minute. You know, you all will get your shots here.

But this is not what we are talking about. We are trying to be reasonable. We are not going back and digging through the stacks

of things. And these are quotes of you. I know it may be puzzling but I scribbled them as you spoke.

I happen to believe in the result of *Roe* v. *Wade*. I do not believe in some of the tortuous reasoning that got them there, but I believe in *Roe* v. *Wade*, and I am not at all concerned about what this nominee will do, and I do not have any idea, what he will do.

But it will be done in a legal way, and a thoughtful way, but I do not think highly charged phrases are appropriate here.

If you want to know about what Judge Kennedy did, instead of just "romancing the rocks", he did 500 hours of pro bono work for a development project in his home community, called the Plaza de la Flores. Five hundred hours plus of pro bono work. I called that "putting your money where your mouth is."

So what are we talking about, this slicing up decisions, and coming to this kind of activity, when you see a guy who laid himself on the line for the Hispanic community in his own community? Five hundred hours plus of pro bono.

Is there anybody around who has done that much in their lives? I never did that much pro bono, I do not think, and I practiced law for 18 years.

Now that is what we are talking about, and so, you know, I would just like to kind of "put the English back on the cue ball" and bring it back across the green here, instead of just off into the vapors.

Now, you know, I think it is absurd to try to nail the Chairman as not having performed his function, and let's just look, if I may, at this issue of comparable worth. Comparable worth. There is not one soul here, or in this chamber listening——

Mr. RAUH. You are not going to give me a chance to answer the point you made before?

Senator SIMPSON. Yes. I have not asked you a question yet. You cannot possibly answer anything. I am not through yet.

Mr. RAUH. No, but I thought the subject of the things you said about me ought to be answered while you did it.

Senator SIMPSON. I know, but you can have your shot, and I will have it privately, or publicly. You know, you had yours.

Mr. RAUH. Well, I want it publicly.

Senator SIMPSON. I only get 5 minutes. To come in and then begin to talk about things of comparable worth, as if somehow we were setting up the sinister idea that nobody believes in equal pay for equal work. That is a given.

There is not anybody here that does not believe in equal pay for equal work. But when you get into comparable worth—and it is interesting to listen to that—comparable worth is never going to sell because it is incomprehensible.

It is a tangled skein of gnarled and convoluted concepts that makes a Gordian knot look like a straight rope. And whoever described it as—a good phrase—"a wild, inextricable maze"—is right. And so, why is it the States should not be free to do their own thing with comparable worth, if they so choose, without judicial imperialism commanding that they enact laws which apparently the legislature is unwilling to enact, and which would "break the bank" of most States in the Union.

Now that is a question, and then you can respond in any way you wish, but I mean, I get my time to talk, too. Shoot.

Mr. RAUH. I will leave to Molly Yard or Professor Ross the answers to your point on comparable worth because they know more about it than I do. But I would like to answer the earlier part of your discussion where you said that we had broken our pick because there was nothing there.

Nothing was asked that would have shown what was there. But secondly, you were criticizing us for saying, well, we would like to know what Mr. Meese knows. I am not a great advocate or lover of Mr. Meese, but I would like to know what he knows about Judge Kennedy's views.

Furthermore, you made two mistakes of fact.

Senator SIMPSON. Please. What are they?

Mr. RAUH. We did not oppose Stevens. We did not oppose——

Senator SIMPSON. Well, I was talking about the National Organization for Women. They did oppose Justice Stevens. I have a quote from there——

Mr. RAUH. You were talking to me at the time. And you also said we opposed Justice O'Connor, that we would oppose anybody that President Reagan sent up. We did not oppose Justice O'Connor. We did not. There was very little opposition to Justice O'Connor, and, as a matter of fact, did you oppose her, Molly?

Ms. YARD. We testified on her behalf. We supported her nomination.

Mr. RAUH. So your statement that we would not support anybody, or would oppose anybody from the Reagan administration, is simply erroneous, sir.

Senator SIMPSON. Well, I will split the difference with you. We have a quote from the National Organization for Women which says, "We oppose the confirmation of Judge Stevens. His antagonism to women's rights is clear." Now, that is what the National Organization of Women did, and that is a quote.

On the other one, I still think that I do not know who would please you from this President. I hold that view.

The CHAIRMAN. Would anyone else like to comment?

Ms. YARD. I would like to say quickly that it is the National Organization for Women. We are an organization of men and women for women's rights. We did support Sandra Day O'Connor. Eleanor Smeal testified on her behalf.

To play out Joe Rauh's belief that you can know where a person stands on rights, her record was very clear, and that is why we supported her.

On the comparable worth, the pay equity case, which is the *AFSCME* case, it is common practice in business and industry to do job evaluations, to classify them, and to assign wages and salaries according to the classifications. And the evaluation is based upon educational requirements, skill requirements, experience, and judgment.

The State of Washington did study three percent of their many, many jobs in the marketplace to find out what the marketplace was paying them. Then not doing a job evaluation, they simply assigned the rest of the jobs according to a system which they set up. That was that if you were, for instance, in one example, a school

security guard, female, you got assigned to the clerical classification. And if you were a school security guard, male, you got assigned to the security classification. Needless to say, the security classification paid a much higher rate of pay, and it was filled by men.

It is very clear from the studies which the State of Washington made over and over again and from their very own admission, in the words of Governor Dan Evans and, subsequent to that, Governor Ray, that they did discriminate in jobs that were simply women's jobs. And they did it because they wanted to keep the peace. They wanted to keep the historical alignment. They did not want to make any adjustments.

Judge Kennedy totally ignored the findings, which showed sex discrimination, because I guess he has problems with the whole concept of equality for women.

The CHAIRMAN. Professor Ross?

Professor ROSS. I do think there is some academic criticisms that can be leveled at his opinion in AFSCME, and in particular a failure to follow Supreme Court precedent and, I think, a real distortion of Supreme Court precedent. That is what concerns me very seriously about his opinion.

I lay it out somewhat in my written testimony. I think there are two basic criticisms that can be leveled. One is that in terms of intentional discrimination, he is trying to use this new higher standard that I referenced in my oral statement a moment ago. Without really discussing the difference between the two standards, he starts by quoting from 14th amendment law, dealing not with facial sex-based classifications, but rather with neutral classifications where the court has imposed a special requirement as to how to show intent. He suggests that that higher level of intent has to be shown in a case which is about facial discrimination, about discrimination based on sex, where you are not alleging a neutral practice.

Second, he suggests that the Supreme Court in title VII areas has required that statistical evidence of discrimination which is used to show intent to discriminate must be corroborated by other additional evidence of discrimination. Well, that is flatly untrue. The holding of the Supreme Court in *Teamsters* was precisely that statistics alone were sufficient to make out a prima facie case of intentional discrimination.

Having said that he had to have corroborative evidence, he then went on to discount the corroborative evidence that was, indeed, put forth in that case. Now, the corroborative evidence was very strong, but it was the kind of evidence that, as I said earlier, I think he tends to discount the significance of. The corroborative evidence was that the State had for many years officially segregated jobs on the basis of sex. Women were not allowed to apply to some jobs, and men were not allowed to apply for others. Jobs were kept as sex segregated.

And in addition to that evidence that the jobs were officially segregated by sex—it was an official policy—they brought in expert witnesses to say that the effect of segregation is to carry over on to wage discrimination that often persists long after sex segregation is discontinued.

He ignored all that evidence, basically, and said that the corroboration of the statistical evidence was not sufficient. Now, I think the statistical evidence alone should have been sufficient, but statistics plus this corroboration of a long-standing practice of segregating workers on the basis of sex has to be read to say something about the State's intent to discriminate within the meaning of intention under title VII.

Indeed, the Supreme Court in another case, *McDonnell-Douglas*, which is a very early and landmark case, has said that you can take an employer's general practice of discrimination and reason from that that, in some other act committed by that same employer, it makes it more likely than not that the employer has discriminated.

Okay. So that is a whole area of law where I think he was distorting existing Supreme Court precedent to reach a result he wanted. That is only one area.

The second area was this new doctrine he came up with, with no support in Supreme Court law at all, that disparate impact doctrine does not apply to wage discrimination cases. There is simply no support in the Supreme Court cases for that notion. In fact, I show in my written statement that many of the criticisms he levels at using disparate impact analysis for wage discrimination can be applied to the kind of employment testing decision in *Griggs*, that was involved in *Griggs*, the very first disparate impact decision by the Supreme Court. He says, gee, wage systems take account of a multi-faceted number of factors. That is true of tests. He says employers go through a lot of different steps to arrive at the final result. That is true of tests. It is true of both tests and a wage system that there is a final number; you pass or you do not pass the test. You have a wage. Those numbers can be used to quantify the effects on a certain sex or race of the particular system.

So I do not think there is any support in the Supreme Court doctrine for the result he reached, which was: I refuse to apply this doctrine at all. I just will not apply it. So I think it is very seriously attackable for not following existing Supreme Court precedent, and it gives me great concern that in an area of wage discrimination, when we are dealing with a statue which says simply employers may not discriminate on the basis of sex in compensation—that is the broad, comprehensive language of title VII—that he is interpreting it in such a narrow and hostile way.

The CHAIRMAN. You answered two of my questions.

Senator Kennedy.

Senator KENNEDY. Thank you. Mr. Chairman, I want to express real appreciation for the testimony that we have received, and I think any fair listening and viewing of our witnesses would have to show that they have spent a great deal of time in reviewing the writings and reviewing the cases and identifying these issues for this committee. I think they have given us much to think about.

I must say that these are always—well, in this case—a close question and a close call. The areas which have been reviewed here, perhaps as stated by Mr. Rauh, touch on many of the areas which I have been most concerned about. There are those words "equal justice under law." This nominee is important not for those that are going to have the well-financed lawyers who are going to

appear before the Supreme Court, but for those that may be left out or behind. That covers a wide range of groups.

It is in the areas of civil rights where we reviewed with him his thinking on *Circle Realty* and found out that that reasoning that he had was overruled by a very substantial group in the Supreme Court, seven to two. We had the *Mountain View* case involving handicapped children, and that was overruled in the Supreme Court by a unanimous court.

Then his view about the various class action suits, which are really rather basic to individuals to be able to continue to redress their grievances—in the *Pavlac* case his view was overruled.

So these points which you raise, I just would hope that you recognize, are enormously troublesome and disturbing. We have reviewed the *AFSCME* case, the *Beller* case to some extent.

We have got very short time. I would like to take each of those areas that we have spent the better part of a couple of days coming at, perhaps in different ways, by members of this committee. But say in those cases involving civil rights; I think we already have heard a good deal on comparable worth in response to other questions.

But with regards to minorities and women, and perhaps the handicapped or those that want to have their day in court and redress their grievances through the court system, how concerned should they be? How concerned should they really be if this nominee is advanced to the Supreme Court?

I will ask the question to Mr. Rauh, and then any of the others, if you want to comment on it. I think they are going to use all my time.

Mr. RAUH. I guess I may in part have answered that question out of my own very deep concern. I believe that minorities and women have a deep concern, and properly have that concern, about where he is going to come out.

It is not that I know for sure that he is always coming out wrong on the Bill of Rights. It is that, with a four-to-four split which we had as recently as the day before yesterday, a four-to-four split in the Court, he becomes the number one man in the legal world: Where is he going to come down?

Should we not have a better reading now? It is not that we should have a hundred percent certainty. But should we not have the feeling that it is more likely that he is coming down on the side of minorities and women than he is coming down on the other side?

I would say that, looking at the cases—the ones I referred to and the ones that you referred to, Senator Kennedy—looking at all those cases, that amounts to nine, if you add to my six the three that you referred to. If you take all those nine cases, is it not fair to say that the probabilities are against minorities and women? Or even if it was only 50–50 that he would come down against minorities and women, I think we ought not take the risk.

It all comes down in the last analysis this way: How much do you care about the Bill of Rights? If you care about it as much as the "rights" groups do, the women's groups, the minority groups, then you are coming down one way. If you have a lesser priority for "rights," you are coming down the other way. This is not a par-

tisan or mean battle. It is getting clearer and clearer that it is a question of what test you are going to use. If you are going to use the test that the President can do pretty much anything, then obviously you are going to confirm Judge Kennedy. On the other hand, it seems to me that Judge Bork was defeated because you did not want to re-fight the battles of the past and that is still the question here.

Do you want to take a chance that you are going to have to refight the battles of the past? I think you should not.

Ms. YARD. I would just like to add that, like Joe, I have spent my entire life on working to end discrimination. He has done it brilliantly in law; I have simply worked to educate and to organize people so that this country shall become a place of equality.

I think the meaning of the whole last 25 to 30 years of this country is that we are moving to a more just society. I can see much progress, and much of it has been because of the legislation which Congress has passed and much of it has been because of the decisions made by the courts of this country.

Senator KENNEDY. If you want to come, fine. We thank you.

Thank you.

The CHAIRMAN. The Senator from Pennsylvania.

Senator SPECTER. Thank you very much, Mr. Chairman.

Mr. Rauh, I support the Chairman's decision in starting these hearings at the time he did. There have been some 5 weeks between November 11th and today.

My staff and I have had a chance to review the opinions; read his speeches; prepare; talk to Ms. Yard and her associates; do follow up work on the AFSCME case.

But it is important that the court be filled. I believe the Supreme Court sent us a message on Monday. I do not think it was a matter of coincidence that they handed down that four to four decision the day they started these hearings.

They need to have a full court to get on with the business of the court.

Professor Ross, I compliment you on a very fine brief. I only had a chance to read it earlier today. It was filed yesterday. And there are some matters there which I find very helpful, and it was a very thorough job.

Mr. Levi, in the interests of equal protection, nobody has asked you a question yet. Let me start with you. And there is not much time to ask questions on the very important subjects which this panel has raised.

And you have commented about Judge Kennedy's views on privacy. He wrote a speech, delivered a speech, last year before this vacancy occurred, where he expressly recognized the right of privacy, and commented on it extensively, among other rights which are not specifically enumerated in the Constitution.

And in that speech he made an analysis of the *Bowers* case, and a case decided by Canadian courts on the issues of privacy, homosexuality, in a way which I consider to be very sensitive and very thoughtful.

And in that same speech, he raised the issue that there might be a different conclusion on *Bowers* if the issue was raised in an equal protection context.

And my question to you is, have you had an opportunity to read that, or hearing my summary of it, if that gives you any assurances of his sensitivity to these issues, and his thoughtfulness about them, and a rather careful judicious approach to them?

Mr. LEVI. Well, let me read you another passage from that speech that to some degree does not reassure me. It is fairly brief, so I will read the entire section.

One can conclude that certain essentials——

Senator SPECTER. Where are you reading from?

Mr. LEVI. This is from—I believe we are talking about the same speech, the speech entitled, "Unenumerated Rights and the Dictates of Judicial Restraint."

Senator SPECTER. Yes, just what page?

Mr. LEVI. I only have an excerpt from here. I can get you the——

Senator SPECTER. Okay, then I will listen.

Mr. LEVI. Okay. One can conclude that certain essential or fundamental rights should exist in any just society.

It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution.

The due process clause is not a guarantee of every right that should inhere in an ideal system. Many argue that a just society grants a right to engage in homosexual conduct.

If that view is accepted, the *Bowers* decision, in effect, says the State of Georgia has a right to make a wrong decision, wrong in the sense that it violates some people's views of rights in a just society.

We can extend that slightly to say that Georgia's right to be wrong in matters not specifically controlled by the Constitution is a necessary component of its own political processes.

Its citizens have the political liberty to direct the government process to make decisions that might be wrong in the idea sense, subject to correction in the ordinary political process.

In other words, he is kicking this issue back to the State legislatures. And we feel that this is an issue that should have been resolved differently than the Supreme Court.

Senator SPECTER. Well, he may be or he may not be. And I agree that there are passages of that speech, as there are passages of most speeches or most opinions, which lean in different directions.

I would, and have, noted his opinion in the *Beller* case where he recognizes that there may be some consensual homosexual behavior which may face substantial constitutional challenge.

So that it is not clearcut as to where he is going to go. And the question in my mind is, how much more we can ask for.

But I would like to ask Mr. Rauh a question at this point. Mr. Rauh, you have submitted also a very good statement, as did Ms. Yard. They have all been very helpful.

And you have taken up a number of cases that I questioned Judge Kennedy about extensively yesterday, the Pasadena school case, *AFSCME* v. *State of Washington, Aranda.* My concerns as to the fact finding process there.

But I wonder if you have seen other cases which he has read. I only took up the ones with him where I had some concern and some problem.

But have you had a chance to look at *Lynn* v. *Western Gillette*, where a case was brought by two female employees under title VII, sex discrimination. And Judge Kennedy found in their favor, saying that the statute of limitations had not begun to run.

Or the case of *Usury* v. *Lacey*, where there was a broad interpretation given to the interstate commerce clause, to uphold a remedial OSHA statute.

Or *National Labor Relations Board* v. *Apollo*, where Judge Kennedy found aliens covered by the National Labor Relations Act.

Quite a few cases where there is real concern about the rights, and about civil rights. And you talk about the Bill of Rights, and you have his support of *Mapp* v. *Ohio*, the *Miranda* decision.

And one of his cases, which had not been noticed or commented about, a fascinating case from the Oregon State courts, *Burr* v. *Sullivan*, where he reversed a conviction for arson on very highly technical grounds, I thought overly technical.

And I discussed this case with him at great length. But he gave the clue away in the opening statement that there was no physical evidence or corroborative evidence to support the conviction except for testimony by two juveniles.

And there was a complex question of cross-examination and motion to strike and so forth.

So that my question to you, Mr. Rauh, and I know how careful you are, aside from the cases that you cited in your memorandum, and the ones which I questioned Judge Kennedy on yesterday, when you view the totality of the cases, haven't you found a good many which are respectful of civil rights, and are extensions of the law to achieve justice in the OSHA cases and the title VII pay discrimination case and so forth?

Mr. RAUH. I have not read everything, and I would be the first to admit that. It really was not possible for me to read all of the cases. I have no staff and I just have not read everything.

I have read as much as I could. There are the six cases in my statement, and there are some others, many others, three of them were mentioned by Senator Kennedy.

Then there are some the other way. But my general impression has been that the cases he went with the plaintiffs were the clear minority. I am glad he did it. But I don't feel that they prevent one from saying this is not a man who has demonstrated support for the Bill of Rights.

I think more often Judge Kennedy has gone against "rights." And I wanted to be able to say this to you, because I think you have studied the cases as carefully as anyone. Of the six I mentioned on which you felt as I do, there is something that runs through them that is very troublesome.

He does not respect the findings below. He very often doesn't even mention the finding below, as he overrules it. He simply goes ahead and states the facts as he thinks of them.

This gives you a feeling of a preconceived notion of what the result should be.

If the district court makes a finding, and the appeals judge does not at least cite the finding and say I cannot accept it, but he simply rides roughshod over it, I think that gives a very bad impression of his judicial conduct.

He talked beautifully here about how a judge should decide a case. But he did not play that game. He took findings and just paid no attention to them.

I can understand overruling a finding of the district court. That is what an appellate judge may have to do on occasion. But at least he should state the finding, and state his reasons and the evidence on which he overruled it.

He did not do that in these and other cases.

Senator SPECTER. Thank you very much, Mr. Rauh. Thank you all very much.

The CHAIRMAN. Ms. Yard, would you like to respond?

Ms. YARD. If I could, I would like to ask our vice president. She has a comment she would like to make in answer to your question.

Patricia Ireland.

Ms. IRELAND. The only thing I wanted to add is that in our reading of the cases, we certainly agree with Mr. Rauh that he does not have a respect for the lower courts' finding of facts.

But in the cases where he has ruled in favor of minorities and women we find to have a pattern; that is, basically, they are very narrow cases limited to the facts, and except—he rules if the statute is so clear, the Supreme Court precedent is so clear, that he is obviously going to be overruled if he does not rule that way.

We do not find a serious commitment in the broad view of his cases. And I do not know whether Professor Ross has seen that same pattern.

Professor Ross. Well, I would like to make a distinction between procedural and substantive decisions in the sex discrimination area.

You are correct that he did issue this finding on this procedural point.

I have not found a single decision where on the merits he has found a woman was a victim of sex discrimination. His only decisions that are favorable are at procedural stages on procedural issues.

Senator SPECTER. Well, often the procedural stages are critical. If you cannot stay in court, you cannot establish your substantive point.

Professor Ross. That is true, but when somebody gets to the point where somebody has won after a full trial and has won a verdict, and he goes to the trouble of remanding—in one situation he remanded on a really peripheral issue; the district court just changed the supposed wrong finding and sent it right back up. It went up to another ninth circuit panel which upheld the finding of the discrimination.

So it was sort of a pointless exercise which this woman had to go through.

And I think it shows that he has trouble finding discrimination where you had the full record available.

Senator SPECTER. Thank you very much.

The CHAIRMAN. The Senator from Ohio.

Senator METZENBAUM. Joe, you and I have been on the same side of many issues, which only goes to show your good judgment in the past.

But when you say to the Chair that the Chair has been taking a patty cake attitude in rushing the hearing, I want to say that that was not his decision alone; that was a decision that he arrived at after discussing the subject with those of us who serve on this committee.

And frankly, not only do I think it unfair, I think you are just offbase because we had a choice. The choice was to go 33 days after the announcement, or the other choice was to wait until we reconvene on January 25th. and that would have been 76 days after the announcement.

Now in all fairness, I must say that at that point we did not know that we would not reconvene until the 25th; we were supposed to reconvene on the 19th. So it would have been 69 days.

But I want to say that this matter did not require the same amount of time as we felt the Judge Bork case required. He certainly has not written as much. He certainly has not made as many speeches. Nor, in all candor, has he been as controversial.

And I would agree with your statement that we cannot afford to play Russian roulette with our dedication to the Bill of Rights.

And you have a perfect right to appear, and I respect your right to appear to oppose Judge Kennedy's nomination.

I challenge you, however, when you challenge that what I would consider to be the integrity of the committee in its hearing process.

I think this committee is determined to live up to its responsibilities, and it took some real heat with respect to the Bork nomination. I think we came out the right way. I think the public purpose was served.

But I am not willing to just sit back and see all of us attacked because you disagree with the conclusion which we might reach.

Mr. RAUH. Senator, I would cut off my leg before I would question your integrity. It was not a question of your integrity when I said you did not give us enough time to prepare, you did not give yourself enough time to prepare. I do not consider that a matter of integrity.

I would not ever consider doing that. I have the highest respect for you, my gosh, after all we have gone through together. As a matter of fact, I do not ever remember disagreeing with you before on anything.

My patty cake reference was to something else, sir. That was to asking questions. I do not think Judge Kennedy was ever pressed properly on his views on matters. I agree you cannot ask him how are you going to vote on *Roe* v. *Wade,* but you can ask, what did you say to your colleagues the day it came down.

That is a perfectly relevant question. I think those are the very kind of things the Justice Department knows when it sends up somebody that you would not want if you knew as much as they know.

But anyway, please do not get any idea that I ever had the slightest question about yours or anybody else's integrity on this committee.

I have fought with some of the people on the other side of the aisle in my lifetime, but I have never questioned their integrity either, and I wouldn't.

Senator METZENBAUM. Thank you.

The CHAIRMAN. Your expressions of affection, Joe, are unusual.

Senator METZENBAUM. Now, the one other question I have is for Molly Yard. Because it relates to something you just said, Joe.

You said in your written testimony that you do not know Judge Kennedy's position on *Roe* v. *Wade*, and therefore, I gather, there is opposition to him.

On that basis, we would have to know what his position is on certain antitrust issues, certain civil rights issues, certain labor issues, certain human rights issues, and the whole panoply of issues.

And I do not think that you really mean that this committee is not meeting its responsibility if we don't find where a particular nominee stands with respect to any particular Supreme Court precedent.

Do you, Molly?

Ms. YARD. Well, what we are saying is that there is one case he has written on privacy that troubles us, and that is *Beller* v. *Middendorf*, when he says there may be a right to privacy.

We think there is a right to privacy, a constitutional right to control our reproductive lives. And I think it is a question of such overriding social importance to this country that I think you have to do a very careful job to figure out where he is.

Senator METZENBAUM. But we could not ask him, how do you stand on *Roe* v. *Wade*.

Ms. YARD. Well, all I can say to you is that we know very well, and you know as well as I do, that Senator Helms said I will filibuster this man until he is turned down, and clearly what he was talking about was the right of a woman to choose.

He talked to Senator Helms. Senator Helms is satisfied. And I read what the right to life people around the country are saying, and they are all satisfied.

And I am saying that this is such a serious problem that I do not think you can take the risk of putting somebody on the court who is going to bring back the days of illegal abortion to this country.

It will be total chaos. And I think the Senate Judiciary Committee better understand that. Women will not accept overturning of *Roe* v. *Wade*.

Senator METZENBAUM. Well, you are preaching to the choir when you are speaking to me, because I have taken my position on that.

Ms. YARD. I know you—I know well.

Senator METZENBAUM. But having said that, I do not know whether or not the Rights to Lifers are proceeding under a false assumption.

We certainly know that Judge Kennedy specifically disavowed the facts presented in that article which was referred to yesterday. And he was very categorical and very unequivocal in saying it just did not happen that way.

I think my time has expired.

Ms. YARD. Well, you have to look at the pattern, I think. He has not found really very much discrimination against women in this country in his cases. He certainly, I do not think, understands it.

His answer to Senator Kennedy on the club thing, I just—I thought he put his foot squarely in it. He said, well, I got out of the Sutter Club because everybody knew me there as a judge, and I was uncomfortable because of the exclusionary policy of the club.

But in the Olympic Club, people didn't really know me so it didn't make any difference. It made a difference, because it said what he believes about discrimination, and he believes it is unimportant.

And that—I look at what he has done on cases affecting women. And I think he will come down on the side that it is unimportant what happens to our lives.

Senator METZENBAUM. Thank you, Mr. Chairman. Thank you, Molly.

The CHAIRMAN. The Senator from Alabama.

Senator HEFLIN. Mr. Chairman, I have had to be absent because of a commitment I made. Therefore, I yield my time to Harry Truman Simons next to me.

The CHAIRMAN. The Senator from Illinois. Welcome back.

Senator SIMON. Thank you, Mr. Chairman. I thank the Justice from Alabama here, too.

Joe Rauh, you said that Judge Kennedy has, in making decisions, failed to take into consideration the previous decisions of the court—and I am quoting—you say "He has a preconceived notion of what the decision should be."

Are you suggesting that he has an ideological agenda?

Mr. RAUH. I would not use the words "ideological agenda." The quotation is right. It is taken from my answer to Senator Specter. What I said there was, if you take the cases where he has ruled against rights, you will find a pattern in them of Judge Kennedy running rough shod over findings of the lower courts.

Now, if you will indulge me. I have read those cases, and there is such a strain of overruling, rough shod, the findings of the district court. He would not state the finding and then give the evidence to the contrary. He simply would not mention the finding. He would just state the facts the other way.

I said if you have a pattern of continuous overruling of the findings below, always resulting in holding against rights, this is a tendency that could only come from some preconceived notion.

If you really were grappling with the problem, if you really were grappling with the effort to get the right answer on the facts, you would either accept the finding below, or state it, and give the reasons why you are rejecting it. It is on that basis that I said that this was some evidence of a possible preconceived notion against the rights.

I think in that context, it is a perfectly correct statement. I do not think it proves that he has an ideological agenda, and I would not make that assertion.

Senator SIMON. Let me rephrase it. There is not an ideological predisposition toward a certain decision? Or is there?

Mr. RAUH. There may be. I suggested this based on the unfair, inadequate, and erroneous treatment of the findings below in these cases. On that basis, there must be some preconception.

The ordinary appellate judge—and gee, I am going to get it from Judge Heflin because he probably knows more about this than I do—but I have always thought that the first thing the appellate judge has to do is decide whether he can accept the findings of the court below.

And then, if he decides he cannot, he has to give some reason why, from the record, why he is not accepting the findings of the court below that saw the witnesses.

Now, I think if you have a pattern of doing that, and it always comes out against rights, this is some evidence of a preconceived notion against those rights.

Senator SIMON. You mentioned the sensitivity to the Bill of Rights, and I agree. You mentioned three specifics areas: *Roe* v. *Wade*, church/State, and the whole civil rights, affirmative-action area.

The one that has not come under discussion here is the church/State area. I have four decisions that he has made in this area, and they are fairly narrow decisions.

Do you have any sense of where he is in this church/State sensitivity on the Bill of Rights?

Mr. RAUH. There is not much evidence one way or another, I would admit. The best evidence I know is this piece in the McGeorge Law School paper. There was an interview there, and I think Judge Heflin referred to the interview.

Let me just read this. It was an interview back in 1968. His views may have changed. I simply do not know. It was disturbing then and still is.

This is an interview with Judge Kennedy before he was a judge.

He concedes the difficulty of justifying tax exemptions for churches under recent Court rhetoric, but "I would hope"—and this is a quote from Judge Kennedy—"the Supreme Court finds some way to allow them to continue to promote freedom of religion."

And then continuing the quote, "And the Court should leave room for some expressions of religion in State-operated places".

The public school is the most obvious State-operated place. I think at that time his view would not have been for a very strong separation of State and church, but I do not think there is very much after that, that I know about. That was the only thing I know anything about.

Senator SIMON. If I may ask one more question here. If I may ask it of Ms. Yard and Ms. Ross.

In the *Beller* v. *Middendorf* decision, Judge Kennedy cited *Roe* v. *Wade* with approval, and I am told that there are some groups now who are not pleased with the Kennedy nomination because of that.

Any observations that either of you have on that?

Ms. YARD. That is not my impression, that he cited it with approval. Patricia Ireland, who is our vice president, and is a lawyer, and has read many of these cases, her reading of it was that he simply cited it, not with approval, but just cited it.

Professor Ross. I do not have anything to add to that.

Mr. RAUH. It was the law, Senator Simon. It is the law, and it was his obligation to, if it was relevant, to cite it. I do not think that gives any evidence that he would have voted that way, or will vote that way when it comes up again.

Senator SIMON. All right. I thank you very much. I have no further questions, Mr. Chairman.

The CHAIRMAN. Now, in your statement, you say:

Judge Kennedy, yes, and even Judge Bork, might have been acceptable risks on the Court with the majority clearly devoted to the Bill of Rights. Their differing views might have sharpened the deliberations of the Court, but the Supreme Court is balanced, four to four, on the primary rights issues of the day. Only this week the Court split four to four on an abortion issue.

It requires a ninth Justice who has evidenced clear devotion to the rights of all, especially at a time when our nation is demanding that other countries respect human rights. We cannot afford to play Russian roulette with our own dedication to the Bill of Rights. A vote to confirm Judge Kennedy is a vote to take that risk with the very fabric of our society.

And then you indicated, in response to Senator Kennedy, as you were explaining the difference between your view and some others, that those who would—in order to show your respect and concern for the Bill of Rights, you should vote against him, and those who might vote for him, would vote for him, would be evidencing the fact they had less concern for the Bill of Rights.

Is that correct?

Mr. RAUH. Almost. It is substantially correct. I was simply distinguishing on the basis of how much devotion to the Bill of Rights one would demand. Essentially what you said is a fair statement, sir.

The CHAIRMAN. You have known Professor Tribe for a long time. Do you think he lacks devotion to the Bill of Rights?

Mr. RAUH. I think Professor Tribe, who also happens to be a good friend of mine, has real devotion to the Bill of Rights. I think Professor Tribe did not have adequate time to study the cases.

The CHAIRMAN. He indicated to me he had plenty of time to study the cases. He indicated to the committee he had plenty of time to study the cases.

Mr. RAUH. Well, he just, for example, was wrong on a case this morning, the first case I cite. That is the *San Fernando* case, where Larry said that it was in effect a dissent that Judge Kennedy gave. That is not true at all.

The issue there was whether you should have at-large or district elections. Well, what Judge Kennedy said, and what Larry Tribe bought, was that the remedy of district elections was not related to the discrimination there in addition to the fact the Mexicans never got elected.

"Well," the Judge said in effect, "I would have given them a remedy other than district elections." But the things that were happening there, like polling places in white homes, and all the other discriminations against Mexican-Americans there—they were relevant to at-large elections versus district elections.

In other words, Tribe mis-read that case. All I am saying is that it seemed to me that it was not his normal, thorough preparation. Maybe if that is an inadequate explanation of our differences, maybe there are just differences here.

The CHAIRMAN. I am not asking for an explanation of differences. I was asking directly, do you think that Professor Tribe is less committed to the Bill of Rights than you are?

Mr. RAUH. I plead the fifth amendment.

The CHAIRMAN. Do you think I am less committed to the Bill of Rights than you are?

Mr. RAUH. That is a question—if you ask that question——

The CHAIRMAN. I did.

Mr. RAUH [continuing]. And you insist on an answer, my answer has to be yes.

The CHAIRMAN. Do you think Senator Kennedy is less committed to the Bill of Rights than you are?

Mr. RAUH. I do not want to say less committed, but I will say this. I have spent more of my life in the Bill of Rights area than even Senator Kennedy, and even you. I want to change my answer to the question about you.

The CHAIRMAN. You do not have to.

Mr. RAUH. Wait a minute. I want to do it because I want to be precise. You are asking me something that involves our relationship, which I treasure. I do not say you are less committed—I want to withdraw the answer that you are less committed. I want to put it this way.

I have devoted more of my lifetime to the Bill of Rights than you have, and that creates a feeling for the Bill of Rights that someone who has not devoted that much of their life to it cannot have.

I would rather state it that way than the way I stated it first.

The CHAIRMAN. Senator, my time is about up. I have more questions, but do you have more questions?

Senator HEFLIN. No.

The CHAIRMAN. Professor, I found your testimony, quite frankly, your written testimony particularly, fairly compelling, to tell you the truth, and I would like you to, if you would—I do not want to delay the hearing—but I would like you to explain, once again, for the committee, the essence of why you believe that Judge Kennedy was wrong, and apparently result-oriented in the *Washington State* case, the *AFSCME* case.

Professor Ross. Okay. Well, to start with, he, in *Washington State*, says this kind of case is inappropriate to apply disparate impact analysis at all to, and he cites the two major Supreme Court decisions on disparate impact analysis: *Griggs* v. *Duke Power Company*, and *Dothard* v. *Rawlinson*. And he purports to claim that those decisions require a single discrete policy.

And there is nothing in either of those decisions that says that. He is simply making that up. And if you look at the policy that was at issue in *Duke Power*, which is the very first case on the issue, in which the Supreme Court first articulated the doctrine, it involved employment tests.

Employment tests are, by definition, a device for taking account of a lot of different factors—trying to decide how a person does on a lot of different scales. And they are not a simple instrument to put together. An employer has to go through a fairly sophisticated process to decide what is the final employment test that he wants to use.

Now the criticisms that Judge Kennedy levelled at the use of disparate impact as applied to a wage case was that essentially it took account of multi-faceted information and therefore was inappropriate, and also, that the employer had to go through a lot of different steps in order to arrive at the wage disparity. I see no difference between the employment system which the Court applied disparate impact to in 1971 and the wage case.

So I do not find his citation at all persuasive, and I think he is really distorting existing Supreme Court law to arrive at a result he likes.

The CHAIRMAN. How have the other circuits ruled on similar cases?

Professor Ross. Well, there is only the seventh circuit that has ruled in the wake of the Supreme Court's decision in *Gunther*, and the relevance of the Supreme Court's decision was that it, for the first time said, we are not going to confine wage-discrimination cases to cases that are like Equal Pay Act cases.

That is, where men and women are doing exactly the same job. So, in the wake of the *Gunther* decision which says we are not going to confine cases to Equal Pay Act type cases—which is where the courts were going before that—there have only been two circuit court opinions since then, his and Judge Posner's in the seventh circuit.

And I personally just do not find his reasoning persuasive, and I see him distorting existing law. I found very troubling his importing of this 14th amendment standard for neutral rules, where the Court said that you have to show that something was done in order to have an effect on a certain group, and which is appropriate where you are talking about a neutral policy, not a facial policy.

He imports that into this title VII case where he is not dealing with that, and goes on to say, to suggest that the Supreme Court requires, to prove intentional discrimination, something more than statistics showing that men and women are treated differently.

But the Supreme Court, on the contrary, has ruled that statistics are sufficient. That was its holding in the Teamsters' case in 1977. The defendants, and Teamsters had said statistics are not sufficient to make out a prima facie case, and the court replied yes, they are.

So Kennedy says, well, statistics are okay but you have to corroborate. Not true. Okay. But even accepting his point that you have to corroborate, he goes on to say: oh, the corroboration we have here is meaningless. The corroboration we have here was a longstanding pattern of the State of Washington segregating its workers by sex, and he just discounts it.

Now what I am saying is that that is highly significant corroboration. It is an official State policy of sex segregation, and it is of a piece with his prior—you know, I went through his inability, apparently, to recognize facial discrimination.

He tends to use a line of analysis that the Supreme Court has come up with in a case called *Burdeen*, where the Court uses shifting burdens of proof to figure out if a policy is based on sex when the employer does not admit it. But you do not have to do that when you have got an explicit sex-based policy.

The CHAIRMAN. I understand.

Professor Ross. And that is what you had in the *Washington State* case.

The CHAIRMAN. Let me shift gears to another subject with you, and I will not trouble you much longer.

There is a lot of concern, I think not only among the four of you, and all the members, from Senator Humphrey to Senator Simon on this committee—I say that in terms of seniority—the entire committee, about what the outcome of further decisions relating to the

right of a woman to control her reproductive rights, and in particular, whether or not—we always hear discussed and debated, longed for, or loathe the possibility that *Roe* v. *Wade* may be overturned. And I for one think if that occurs, if we think we saw demonstrations in the 1950's and 1960's in Washington, DC., I think we had better batten down the hatches in terms of the extent to which this issue is felt strongly by both sides, by hundreds of millions of people, 200 million people, probably.

And it is discussed in terms of the Court being split on *Roe* v. *Wade*, and that whomever comes along to fill the ninth vacancy will be the deciding vote on *Roe* v. *Wade*.

Is it your professional opinion that in fact the Court is split on *Roe* v. *Wade*, on the fundamental question of whether or not there exists a woman's right to privacy, to any degree, to control her body, her reproductive organs? Is there really a four to four split, now, or is it in fact not now a five to three split?

What is the state of play now as you see it?

Professor Ross. I do think it is split, four-four.

The CHAIRMAN. Do you think O'Connor would rule to overrule *Roe* v. *Wade*?

Professor Ross. It is impossible to predict for sure. So far, she has voted in every occasion against the right to abortion in the cases that have come before her.

I suppose——

The CHAIRMAN. Hasn't she used language—I am sorry. Go ahead.

Professor Ross. I suppose it is possible to read her language as saying perhaps she would not support criminalization of abortion. It is hard to tell. She doesn't articulate it very clearly.

The CHAIRMAN. In any of her decisions, does she recognize the right of privacy, the premise upon which the original decision was based?

Professor Ross. She talks about a substantial burden, that the substantial burden can not be placed on it.

The CHAIRMAN. On what?

Professor Ross. On the right to privacy. But as I said, as Mr. Rauh just pointed a moment ago, the decision came down four-four, just 2 days ago.

The CHAIRMAN. Well, that was a different decision.

Professor Ross. But you know, it is not——

The CHAIRMAN. It is very important, but a different decision.

Professor Ross. Well, it is not just the central decision that is important.

The CHAIRMAN. I am not saying that. Let me ask the question—I acknowledge that each of these decisions is important. I am asking you about the central decision, because when we discuss it here and you use the phrase "*Roe* v. *Wade*," most Americans watching this, any Senator reading the record, thinks of it initially in terms of the central decision.

All of these decisions are critically important. I am asking you about the central decision.

Professor Ross. Well, you see, I am not so sure I think there is a valid distinction between central and the others, because the essential question that is being decided in each of those cases is what

women are going to have the right to exercise their right to an abortion.

And my concern is that cases that are viewed as not central are in fact very central for the women affected by those decisions who might lose their right to abortion.

The CHAIRMAN. I think there is a semantic difference. Okay. Obviously you are not anxious to answer the question. I can understand why.

Mr. Levi, I would like to ask you one—I said that was my last question, but I want to ask you a question, if I may.

Do you find any solace, or do you think it was just a little bit of theater on the part of Judge Kennedy when he indicated that—when I pressed him on the right to privacy, and he indicated that the right to privacy may be in the state of evolution not unlike—and he made a comparison.

Do you read anything into that, or do you just think that was just——

Mr. LEVI. I think that is an almost an attempt to read tea leaves, or to extract a conclusion that is not necessarily there in the record. I think that certain rights are so fundamental that we shouldn't be talking about evolution; we should be talking about "they are there, and I support it."

The CHAIRMAN. I happen to agree with you, but let me ask you though—I am trying to get a sense of what—well, let me ask it another way, then.

Could a lower-court judge applying the existing Supreme Court law have ruled differently in the case you referred to, that concerns you about Judge Kennedy?

Mr. LEVI. I think in several of the cases he could have ruled differently, and particularly in the Civil Service cases, where he essentially rejected the notion, essentially stated that he disagreed with the notion that civil servants who are gay have a right to constitutional protection?

The CHAIRMAN. Thank you. Would anyone else like to make a closing comment?

Mr. RAUH. No, you have been very patient.

Ms. YARD. Very patient. Thank you very much.

The CHAIRMAN. That is good as I am ever going to get. Thank you very much. I appreciate it.

Our next panel is comprised of four witnesses. Gordon D. Schaber—Dean Schaber has been Dean of McGeorge Law School since 1957. He was a presiding judge of the Sacramento County Superior Court for several years in the 1960s, and has also been a member of the California—I am not sure why that is relevant—Democratic State Central Committee since 1974. That is nice to know, but I am not sure what relevance it has.

Mr. Leo Levin is the Leon Meltzer Professor of Law at the University of Pennsylvania Law School, where he has taught since 1949, and Ms. Wendy Collins Purdue is Associate Professor of Law at Georgetown University Law Center, and clerked for Judge Kennedy in 1978 and 1979.

And Dean Susan Prager is Dean of the UCLA Law School, and in 1986 was President of the American Association of Law Schools.

We welcome you all here, particularly you, Dean Prager, for the distance you had to travel to get here, and also you Dean Schaber. It is a long way from California.

At any rate, happy to have you all here. And with that, why don't we begin in the order that you have been called?

STATEMENT OF A PANEL CONSISTING OF GORDON SCHABER, DEAN, McGEORGE SCHOOL OF LAW, UNIVERSITY OF THE PACIFIC; A. LEO LEVIN, PROFESSOR, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL; WENDY COLLINS PERDUE, ASSOCIATE PROFESSOR, GEORGETOWN UNIVERSITY LAW SCHOOL; AND SUSAN WESTERBERG PRAGER, DEAN, UNIVERSITY OF CALIFORNIA AT LOS ANGELES SCHOOL OF LAW

Mr. SCHABER. Thank you, Senator and members of the committee.

The CHAIRMAN. Excuse me. I almost forgot. I have to swear you, if I may.

Mr. SCHABER. Oh, that is right.

The CHAIRMAN. All of you, if you please, rise.

Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. SCHABER. I do.

Mr. LEVIN. I do.

Ms. PERDUE. I do.

Ms. PRAGER. I do.

Mr. SCHABER. I appear here today in my individual capacity to support the nomination of Judge Kennedy, and I am doing so after an opportunity to observe him first as a person, a member of a community, as a practicing lawyer, as a law teacher, and judge of the court of appeals.

My personal vantage points were from the fact that I was a practicing lawyer for 12 years in the same building where he undertook the private practice of law after his father passed away.

I was the presiding judge of the Superior Courts of California in Sacramento while he was in active practice. And I also appear as a Dean—at the time, Dean of the McGeorge School of Law of the University of the Pacific, who sought him out to teach law some 23 years ago.

He has excelled in all of the tasks that I have mentioned. His interest, you heard, in government and our court systems started when it was found that in his elementary-school curriculum, he simply couldn't be confined, because of his intellect and his energy. And as Senator Wilson told you, at age 10 years he was already a full-time page in the State Senate in California, and was following his father around at trials in California.

The legal education you have heard about at Harvard Law School and his service in the large San Francisco law firm prepared him very well for the service that he rendered as a private practitioner in Sacramento.

In that private practice, I was able to observe skills that were tremendous in terms of the scope of legal subjects, in an era, of course, when generalists were more common than they are today.

He quickly became known in our community as a practiced trial lawyer, a skillful and able one. He was very effective in the courts, a joy for me to see and hear about.

As Dean, I decided to seek him out for law teaching. I did that because I was aware of his intelligence, observed an analytical

skill, knew that he had excellent professional values, and he had superb ability at communication, which includes a great wit.

And during the past 22 years of that teaching, the program at our law school, McGeorge, and the lives and the capacities of his students have been greatly enriched.

Testimonials to his teaching abound. The record contains the salutes of his students, and they acknowledge his legal capacity, his fine judicial temperament, and particularly his balanced judgments on the issues that were considered in the classroom.

I observed a willingness during his practice to include pro bono service, and his devotion that was mentioned here by one of the Senators to the Hispanic community in Sacramento by the hundreds of hours that he provided in assistance to them for the local project which united thousands in the socio-economic spectrum of Mexican-Americans in Sacramento.

I was present at the installation when he became an appellate judge. He reached out and closed by quoting Holmes in saying that law had been the business in which he had devoted his life, and that he would show less than total devotion if he did not do all that he had within him to improve it. I think that is an accurate reflection of his dedication.

Now, while those in constitutional law are better equipped than I am as a contracts professor, my readings of his opinions demonstrate to me a further intellectual refinement. I think Professor Tribe said it best today.

He is probing in his investigation. He is thoughtful and straightforward. I think he will continue this devotion in an objective manner. I think he will have compassion and empathy for all those who present themselves. He will do that without personal predilection, without a specific philosophical inclination, with an aim at consensus-building, by a close examination of the facts, consideration of the issues on a case-by-case basis, and an abiding respect for precedent.

I think that as I listened to these 2 days of testimony of his, I was reconfirmed in my observations. I urge a vote of confirmation. If I have a moment, I think I can explain to Senator Heflin the concern he raised this morning about a contingent fee case, should you want that to be explored. I was the presiding judge and know about that case.

Thank you, Mr. Chairman.

[The statement of Dean Schaber follows:]

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TESTIMONY OF DEAN GORDON D. SCHABER BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, IN SUPPORT OF THE NOMINATION OF ANTHONY M. KENNEDY, DECEMBER 15 AND 16, 1987.

MR. CHAIRMAN, AND MEMBERS OF THE COMMITTEE:

I APPEAR HERE IN MY INDIVIDUAL CAPACITY TO SUPPORT THE NOMINATION OF JUDGE ANTHONY KENNEDY.

I DO SO AFTER HAVING HAD THE OPPORTUNITY TO OBSERVE HIM AS A PERSON, A MEMBER OF A COMMUNITY, A PRACTICING ATTORNEY, A LAW TEACHER AND A JUDGE OF THE COURT OF APPEALS.

MY VANTAGE POINTS HAVE BEEN AS A PRACTICING MEMBER OF THE BAR FOR TWELVE YEARS IN THE SAME BUILDING WHERE HE UNDERTOOK PRIVATE PRACTICE AFTER HIS FATHER PASSED AWAY, AS THE PRESIDING JUDGE OF THE SUPERIOR COURTS OF CALIFORNIA IN SACRAMENTO WHILE HE WAS IN ACTIVE PRACTICE, AND AS THE DEAN OF THE McGEORGE SCHOOL OF LAW OF THE UNIVERSITY OF THE PACIFIC WHO SOUGHT HIM OUT TO UNDERTAKE THE TEACHING OF CONSTITUTIONAL LAW TWENTY-THREE YEARS AGO.

HE HAS EXCELLED IN EACH OF THE ENDEAVORS I MENTIONED:

1. HIS INTEREST IN OUR GOVERNMENT AND COURT SYSTEMS BEGAN WHEN HIS ELEMENTARY SCHOOL CURRICULUM SIMPLY COULD NOT CONTAIN HIS INTELLECT AND ENERGY. HE BECAME AN ALMOST FULL-TIME PAGE IN THE STATE SENATE OF CALIFORNIA AT TEN YEARS OF AGE AND WAS SOON FOLLOWING HIS TRIAL LAWYER FATHER AROUND THE STATE TO OBSERVE COURT TRIALS. HIS LEGAL EDUCATION, AS AN HONOR GRADUATE AT THE HARVARD LAW SCHOOL, AND HIS SUBSEQUENT SERVICE IN A LARGE SAN FRANCISCO LAW FIRM PREPARED HIM WELL FOR THE SUCCESSFUL PRIVATE PRACTICE THAT FOLLOWED IN SACRAMENTO.
2. IN THAT PRIVATE PRACTICE, HE DISPLAYED SKILLS OVER AN IMMENSE SCOPE OF LEGAL SUBJECTS AND WAS KNOWN FOR TREMENDOUS CAPACITY IN MANY FIELDS IN AN ERA WHEN GENERALISTS IN THE PRACTICE WERE MORE COMMON THAN NOW. HE QUICKLY BECAME KNOWN AS A SKILLED TRIAL LAWYER, AND HIS EFFECTIVE WORK IN THE COURTS WAS A JOY FOR ME TO OBSERVE AND TO HEAR ABOUT.
3. AS DEAN, I SOUGHT HIM OUT TO UNDERTAKE LAW TEACHING. I DID SO BECAUSE I WAS AWARE OF HIS INTELLIGENCE, ANALYTICAL SKILL, AND THE INTENSITY AND DEVOTION HE BROUGHT TO HIS WORK. HE HAD EXCELLENT PROFESSIONAL VALUES AND A SUBPERB ABILITY AT COMMUNICATION, WHICH INCLUDES A GREAT WIT. DURING THE PAST TWENTY-TWO YEARS OF HIS TEACHING, HE HAS ENRICHED THE LEGAL

EDUCATION PROGRAM AT McGEORGE AND THE LIVES AND CAPACITIES OF HIS STUDENTS. TESTIMONIALS TO HIS TEACHING ABOUND. THE RECORD CONTAINS THE SALUTES OF HIS STUDENTS, WHO ACKNOWLEDGE HIS LEGAL CAPACITY, HIS FINE JUDICIAL TEMPERAMENT AND HIS BALANCED JUDGMENTS ON THE ISSUES.

I OBSERVED A WILLINGNESS TO INCLUDE PRO BONO COMMUNITY SERVICE IN HIS PRACTICE SUCH AS HIS DEVOTION TO ASSISTING THE HISPANIC COMMUNITY IN A LOCAL PROJECT WHICH UNITED THOUSANDS IN THE SOCIO-ECONOMIC SPECTRUM OF THE MEXICAN-AMERICAN COMMUNITY IN SACRAMENTO.

AT HIS INSTALLATION AS AN APPLELLATE JUDGE, HE CLOSED HIS REMARKS BY QUOTING HOLMES WHEN HE SAID, "LAW IS THE BUSINESS TO WHICH I HAVE DEVOTED MY LIFE, AND I WOULD SHOW LESS THAN DEVOTION IF I DID NOT DO ALL THAT LIES WITHIN ME TO IMPROVE IT." THAT IS AN ACCURATE REFLECTION OF HIS DEDICATION.

WHILE THOSE WHO SPECIALIZE IN CONSTITUTIONAL LAW ARE BETTER EQUIPPED THAN THIS CONTRACTS PROFESSOR TO INTERPRET OR COMMENT UPON HIS HUNDREDS OF OPINIONS, MY READING OF SOME OF THEM DEMONSTRATES TO ME FURTHER EVIDENCE OF HIS INTELLECTUAL REFINEMENT -- HOW HE IS PROBING IN HIS INVESTIGATION OF LEGAL MATTERS, THOUGHTFUL AND STRAIGHTFORWARD. HE HAS BEEN DEVOTED TO HIS ASSIGNED TASK ON THE COURT OF APPEALS. HE WILL CONTINUE THAT DEVOTION IN AN OBJECTIVE MANNER, WITH COMPASSION AND WITH

EMPATHY FOR THOSE WHO PRESENT THEMSELVES. HE WILL DO SO WITHOUT PERSONAL PREDILECTIONS OR SPECIFIC PHILOSOPHICAL INCLINATIONS, WITH AN AIM AT CONSENSUS BUILDING, BY CLOSE EXAMINATION OF THE FACTS, WITH CONSIDERATION OF ISSUES ON A CASE BY CASE BASIS, AND WITH AN ABIDING RESPECT FOR PRECEDENT.

I URGE A VOTE OF CONFIRMATION.

The CHAIRMAN. Thank you, Dean. Professor Levin?

Mr. LEVIN. Thank you, Mr. Chairman, members of the committee. It is a privilege to appear before you. I have submitted a prepared statement which may be included in the record. I will make resolve——

The CHAIRMAN. It will be, in its entirety.

Mr. LEVIN. Thank you. I will make these comments very brief.

I came to know and to admire Judge Kennedy some 10 years ago. From 1977 to 1987, I had the great privilege of serving as Director of the Federal Judicial Center, and it was in that connection that I came to know Judge Kennedy.

Let me begin with more recent events. In March of this year, Judge Kennedy was elected by the Judicial Conference of the United States to be a member of the Board of the Center. By statute, only two judges of the United States Courts of Appeal serve on the Board at any one time, and Judge Kennedy was one.

By design, it is a very small Board. Including the Chief Justice who presides, there are only eight members. There is great diversity among the members, but by tradition, they have all been of truly superior quality, and Judge Kennedy was elected/selected in that tradition.

Shortly after his election to the Board, I visited him for an extended visit in his Sacramento chambers, and I recall then being struck by and reporting back to my colleagues about his probing questions and brilliant insights concerning both the Center and broader questions of judicial administration.

He has been most conscientious in the discharge of his duties. I had the opportunity to observe him in connection with the selection of a new Director of the Center. That is Judge John C. Godbold of Alabama, a former chief judge of the eleventh circuit and the fifth circuit.

Judge Kennedy demonstrated a very high standard of his notion of his personal obligation to probe, to assure himself, to verify, and so on. That is just one example.

His reputation had preceded him. Over 10 years, I have observed that he enjoys the esteem of his colleagues, and in one sense, it is almost remarkable that it is all across the spectrum of judicial thought. And it is also true in the academic community as well.

Sometimes the law favors the hearsay of reputation evidence even over that of one person's knowledge and opinion. In this case, I suggest to you that, based both on reputation and personal experience and knowledge, I believe this nominee will make a truly great Associate Justice of the United States Supreme Court.

Thank you.

[The statement of A. Leo Levin follows:]

STATEMENT

OF

A. LEO LEVIN

ON THE NOMINATION OF

HONORABLE ANTHONY KENNEDY

TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SENATE JUDICIARY COMMITTEE

HONORABLE JOSEPH BIDEN

Chairman

December 16, 1987

My name is A. Leo Levin. I serve as Leon Meltzer Professor of Law at the University of Pennsylvania. I first joined the Penn Law School faculty in 1949 and I have taught at the University of Pennsylvania since that time except for relatively brief periods at other academic institutions and rather more extended law-related government service.

My most recent government assignnment was as [illegible]or of the Federal Judicial Center, a position I as[illegible] 1977 and held through July, 1987. It was in that capacity that I came to know Judge Kennedy, probably about ten years ago. Over the years, I have come to know him well and, of no lesser significance, I have come to know the high regard in which he is held by his colleagues in the federal judicial system. I say of no lesser significance but mindful that in some situations the law has preferred the hearsay of reputation evidence to one individual's opinion, I should say of greater significance. Based on that knowledge and reputation, I believe that Judge Kennedy will prove himself to be an Associate Justice of the highest quality. He has the intellect, the integrity, the judicious temperament, and the experience to warrant that assessment.

In the spring of 1987 Judge Kennedy was elected to the Board of the Federal Judicial Center by the Judicial Conference of the United States. By statute, only two judges of the United States Courts of Appeal serve on this Board.

Of course his selection in itself testifies to his reputation for there has been a long tradition of superior quality among those chosen, even as there has been a tradition of great diversity in background, philosophy and style. In his service on the Board, Judge Kennedy was most impressive. We visited for some hours in Sacramento and we talked frequently thereafter. He was perceptive, judicious and most conscientious, not only at meetings, but in the preparation for his participation in important decisions. He was, for example, involved in the selection of the current Director of the Center and discharged his function as a member of the Board in superior fashion.

Judge Kennedy has been involved in the work of the Committee on the Pacific Territories of the Judicial Conference of the United States and we were in contact in that connection. Again, he performed in stellar fashion, exhibiting good judgment and wisdom.

Attending Circuit Conferences of the Ninth Circuit over an extended period, as was my obligation, I became aware of the high regard in which Judge Kennedy is held by his colleagues, including those who do not necessarily share his judicial philosophy.

I recall with pleasure one occasion when I was honored by being assigned to Judge Kennedy's table at a special festivity during the course of a Ninth Circuit Conference. At that time my wife and I had the pleasure of coming to know Mary Kennedy better as well.

It is not irrelevant that a colleague in the academic world, whose work as a professional in the Ninth Circuit brought him in close and frequent contact with Judge Kennedy, spoke of him then and thereafter in terms of highest regard.

Indeed, I can testify that whether I am talking to a federal judge, to colleagues who can hardly be characterized as conservative in outlook, to colleagues who have taken the trouble to study Judge Kennedy's opinions, or to students, the reaction to the nomination has been most affirmative. Indeed, it ranges from "pleased and satisfied", to "enthusiastic and delighted."

I have had the distinct pleasure of conversation with Judge Kennedy while he was wearing his academic hat, to my great benefit. Again, he demonstrated himself to be most impressive: thoughtful, insightful, and wise.

Judge Kennedy's career brings to mind comments of the late Albert Schweitzer who told a group of young people:

> I don't know what your destiny will be, but one thing I know: the only ones among you who will be really happy are those who have sought and found how to serve.

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The CHAIRMAN. Thank you, Professor. Professor Perdue?

Ms. PERDUE. Mr. Chairman, members of the Senate Judiciary Committee, my name is Wendy Collins Perdue. I am an associate professor of law at the Georgetown University Law Center.

From the fall of 1978 to the fall of 1979, I served as a law clerk to Judge Kennedy, and my testimony here today is based largely on that experience.

A law clerk has a unique opportunity to observe a judge in action, and as a result of my clerking experience, I have the highest regard for Judge Kennedy's abilities as a judge and his fitness to serve on the U.S. Supreme Court. I believe he possesses all of the attributes that would make him an outstanding Justice.

He always prepared carefully and thoroughly. He examined precedent and legal authorities in a disciplined and intellectually honest way. He respected binding authority, but not without close scrutiny of whether the holdings were truly on point.

Contrary to comments that have been made today, I never knew him to reach a conclusion first and then seek out or construe authority to justify that preconceived result.

He actively sought out the views of his clerks. He encouraged us to speak honestly. When there was disagreement, he sincerely sought to understand the source of that disagreement, was never doctrinaire, always open-minded in his approach to cases.

I believe Judge Kennedy profoundly appreciated the role of a judge. He understood that cases are not mere intellectual exercises, that they involve real people, and that they have real effects.

At the same time, he viewed his role as a limited one of deciding the controversy before him. If a case posed a difficult question of judgement, he never shied away from making that judgement; however, he never used his opinions as a vehicle for expounding doctrine beyond that which was called for by a particular case.

Two cases come to mind as illustrations of the Judge's approach. The first is *James* v. *Ball*. The issue in that case was the constitutionality of an Arizona statute providing that voting in elections for directors of an agricultural and power district was limited to landowners, with voting apportioned according to acreage.

The voting scheme was challenged as a violation of the Equal Protection Clause of the 14th amendment, and Judge Kennedy upheld that challenge, finding the voting scheme unconstitutional.

The opinion includes not only a careful examination of prior precedent; it also includes a thorough and careful examination of how the water district at issue operated, and that district's impact on the lives of millions of people.

The case was a close one, and Judge Kennedy was ultimately reversed, but by a sharply divided Supreme Court, with the four dissenters explicitly endorsing Judge Kennedy's opinion. Regardless of one's views of the merits of that case, it is, I believe, a good illustration of Judge Kennedy's careful but pragmatic approach.

The second case is *U.S.* v. *Penn*. The case is instructive because it demonstrates that although Judge Kennedy is quite accurately, I believe, portrayed as a restrained and moderate jurist, he is passionate in his pursuit of justice.

In this case, a police officer present at a residence pursuant to search warrant, offered the defendant's five-year-old son a five-

dollar bribe if the son would show the police where his mother had hidden a cache of drugs. The child showed the police where the drugs were hidden, and as a result, the child's mother was indicted.

The ninth circuit sitting en banc held that the evidence obtained through the use of the child should not be suppressed; Judge Kennedy dissented.

Observing that the parent-child union occupies a fundamental place in our culture—and those were his words—he concluded as follows:

"I know for a certainty that none of my brothers sitting in this case would neglect for an instant their duty to protect essential liberties. I regret only that we the dissenters have been unable to convince them that the case before us presents a question of this gravity.

"I view the police practice here as both pernicious in itself and dangerous as precedent. Indifference to personal liberty is but the precursor of a state's hostility to it. That is why the judgement is entered over my emphatic dissent."

Let me conclude on a more personal note. I came to my clerkship with Judge Kennedy somewhat jaded after 3 years in law school dissecting and critiquing judicial opinions. I left that clerkship with a much less cynical view.

In working with Judge Kennedy, I observed a man of integrity who struggled with some truly difficult cases and attempted to reach just resolutions consistent with precedent and our system of government.

He is, I believe, well qualified in every respect to sit on the United States Supreme Court.

[The statement of Wendy Collins Perdue follows:]

TESTIMONY OF

WENDY COLLINS PERDUE

BEFORE THE SENATE JUDICIARY COMMITTEE

ON THE CONFIRMATION OF

JUDGE ANTHONY M. KENNEDY

TO THE UNITED STATES SUPREME COURT

Mr. Chairman, Members of the Senate Judiciary Committee, my name is Wendy Collins Perdue. I am an Associate Professor of Law at the Georgetown University Law Center. From the Fall of 1978 to the fall of 1979, I served as a law clerk to Judge Kennedy. My testimony here today is based largely on that experience.

A law clerk has a unique opportunity to observe a judge in action. As a result of my clerking experience, I have the highest regard for Judge Kennedy's abilities as a judge and his fitness to serve on the United States Supreme Court. I believe he possesses all of the attributes that would make him an outstanding Justice.

Judge Kennedy was always careful and thorough in his preparation. He examined precedent and legal authorities in a disciplined and intellectually honest way. As a court of appeals judge, he respected binding authority but not without close scrutiny of whether the holdings were truely on point. I never knew him to reach a conclusion first then seek out or construe authority simply to justify that preconceived result. I believe Judge Kennedy viewed the very process of writing an opinion as an on-going search for the right result and rationale. He actively sought out the views of his clerks and encouraged us to speak honestly. When there was a disagreement, he sincerely sought to understand the source of that disagreement. He was never doctrinaire and always open minded in his approach to cases.

I beleive Judge Kennedy profoundly appreciated the role of a judge. He understood that cases are not mere intellectual

excercises. They involve real people and they have real effects. At the same time, he viewed his role as a limited one of deciding the controversy before him. If a case posed a difficult question of judgment, he never shyed away from making that judgment. However, he never used his opinions as a vehicle for expounding doctrine beyond that which was called for by the particular case.

Two cases come to mind as illustrations of the judge's approach. The first is James v. Ball.[1] The issue in that case was the constitutionality of an Arizona statute providing that voting in elections for directors of an agricultural improvement and power district was limited to land owners, with votes apportioned according to acreage. The voting scheme was challenged as a violation of the equal protection clause of the 14th amendment and Judge Kennedy upheld that challenge, finding the voting scheme unconstitutional. Judge Kennedy's opinion not only includes a careful examination of prior precedent, it also includes a thorough and careful examination of how the water district at issue operated and that district's impact on the lives of millions of people. The case was a close one; Judge Kennedy was ultimately reversed, but by a sharply divided Supreme Court, with the four dissenters explicitly endorsing Judge Kennedy's opinion. Regardless of one's views of the merits of that case, it is, I believe, a good illustration of Judge Kennedy's careful, but pragmatic approach.

The second case is United States v. Penn.[2] The case is

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[1] 613 F.2d 180 (9t Cir. 1979), rev'd, 451 U.S. 355 (1981).

[2] 647 F.2d 876 (9th Cir. 1980)(en banc).

instructive because it demonstrates that although Judge Kennedy is, quite accurately I believe, portrayed as a restrained and moderate jurist, he is passionate in the pursuit of justice. In this case, a police officer, present at a residence pusuant to a search warrant, offered the defendant's five year old son a $5 bribe if the son would show the police where his mother had hidden a cache of drugs. The child showed the police where the drugs were hidden and as a result the child's mother was indicted. The Ninth Circuit, sitting en banc, held that the evidence obtained through this use of the child should not be suppressed. Judge Kennedy dissented. Observing that the parent-child union occupies a fundamental place in our culture, he concluded his opinion as follows: "I know for a certainty that none of my brothers sitting in this case would neglect for an instant their duty to protect essential liberties; I regret only that we the dissenters have been unable to convince them that the case before us presents a question of this gravity....I view the police practice here as both pernicous in itself and dangerous as precedent. Indifference to personal liberty is but the precursor of the state's hostitly to it. That is why the judgment is entered over my emphatic dissent."[3]

Let me conclude on a more personal note. I came to my clerkship with Judge Kennedy somewhat jaded after three years in law school dissecting and critiquing judicial opinions. I left that clerkship with a much less cynical view. In working with

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[3] Id. at 889.

Judge Kennedy, I observed a man of integrity, who struggled with some truely difficult cases and attempted to reach just resolutions consistent with precedent and our system of government. He is, I believe, well qualified in every respect to sit on the United States Supreme Court.

The CHAIRMAN. Thank you very much.

Thank you, Dean.

Ms. PRAGER. Thank you, Mr. Chairman.

In these brief comments, I want to make clear that while I am the dean of the UCLA Law School, I am not here in my capacity as dean, nor as a representative of UCLA or the University of California.

As some of you know, I was a member of the informal advisory committee that Senator Biden formed this summer to advise him on the President's nomination.

That experience caused me to think deeply about the role of the Senate in the confirmation process, and about the qualities that I believe we should value most highly in a Justice of the Supreme Court.

I am here today urging the Senate to consent to this nomination, because I believe that Anthony Kennedy will approach each issue that comes before him freshly and fairly.

I see him as a person who will listen, who has the capacity to be compassionate, and who recognizes that his decisions affect people, not pieces of paper, or theories, or principles.

While Judge Kennedy has demonstrated himself to be cautious about extending the law, I believe that his openness and his sense of the special role of the Supreme Court with respect to such things as individual rights, including privacy, and of the values protected by the first amendment, will lead him to serious, deep reflection, and at times to fresh conclusions.

In his warm and anti-hierarchical way, Judge and Professor Kennedy has set high standards for those around him, by communicating his own love of his work and the study of the law.

While I have known his reputation in Sacramento for many years, having myself been raised there and having worked for the California legislature, I first came to know Kennedy personally through his effort to attract outstanding law clerks to his chambers immediately after his appointment to the ninth circuit in 1975. Kennedy proved himself to be broadly interested in finding the best possible people. He clearly was not applying political tests to individual candidates in making his choices. He sought intellectual balance in the aggregate in his clerks. And he freely hired women and men.

I want to make clear that I would not be here today if I felt that Tony Kennedy would become a Justice unsympathetic to the need to continue to address racial and gender based discrimination in this society. I believe that Kennedy will strive to be sensitive to discrimination in these, and, I hope, other areas as well.

I do want to take a moment to speak to the private clubs issue. Certainly I wish that Kennedy's reflections with respect to private clubs had evolved more rapidly and with an appreciation that this form of discrimination is indeed invidious. Nevertheless, I see in Anthony Kennedy's actions a significant understanding of the issue and its societal importance.

The unfortunate reality is that a number of powerful men in this society, men from the full spectrum of political viewpoints, have chosen not to put themselves on the line on this issue, and have continued their membership in these discriminatory institutions

which pride themselves on excluding whole classes of people. Knowing Sacramento as I do, I place a great deal of positive weight on Kennedy's 1980 decision to leave the Sutter Club.

Because Anthony Kennedy is both open to discussion and open minded, I am sure that the concerns expressed during these hearings will be taken in by him and reflected on over a long period of years.

To be able to consent to the nomination of a person who is genuinely open, who loves the study of law but also has a real world sense of the impact of the law on individual people, and who is deeply concerned about fairness, suggests that the Senate and this committee has exercised the Senate's constitutional role in a positive, highly significant way.

In part, because I started my career working for the then minority whip of this body, about 23 years ago, I particularly appreciate this opportunity to appear before you, and to urge you to consent to the President's nomination of Anthony Kennedy.

[The statement of Susan Westerberg Prager follows:]

Statement of Susan Westerberg Prager
Senate Committee on the Judiciary
Hearings on
the Nomination of Anthony M. Kennedy
to the Supreme Court of the United States
December 16, 1987

Senator Biden and Members of the Committee, as I begin these brief comments I want to make clear that while I am the Dean of the UCLA School of Law, I am not here in my capacity as Dean nor as a representative of UCLA or the University of California.

As some of you know, I was a member of the informal advisory committee formed by the Chair of this Committee this past summer to advise him on the President's nomination. That experience caused me to think deeply about both the Senate's role in the confirmation process and the qualities that I believe we should value most highly in a Justice of the Supreme Court.

I am here urging the Senate to consent to this nomination because I believe that Anthony Kennedy will approach each issue which comes before him, freshly and fairly. I see him as a person who will listen, who has the capacity to be compassionate and who recognizes that his decisions affect people, not pieces of paper or theories or principles. While Judge Kennedy has demonstrated himself to be cautious about extending the law, I believe that his openness and his sense of the special role of the Supreme Court with respect to such things as individual rights and of the values protected by the first amendment will lead him to serious reflection and at times to fresh conclusions.

In his warm and anti-hierarchical way, Judge and Professor Kennedy has set high standards for those around him by communicating his own love of his work and the study of law. While I have known his reputation in Sacramento for many years, (having myself been raised in Sacramento County and later having worked in the California legislature), I first came to know Kennedy personally through his effort to attract outstanding law clerks to his chambers immediately after his appointment to the 9th Circuit in 1975. Kennedy proved himself to be broadly interested in finding the best possible people; he clearly was not applying political tests to individual candidates in making his choices, he sought intellectual balance in the aggregate in his clerks, and he freely hired women and men.

I want to make clear that I would not be here today if I felt Tony Kennedy would become a Justice unsympathetic to the need to continue to address racial and gender-based discrimination in this society. I believe that Kennedy will strive to be sensitive to discrimination. Certainly, I wish that his reflections with respect to private clubs had evolved more rapidly and with an appreciation that this form of discrimination is indeed invidious. Nevertheless, I see in Anthony Kennedy's actions significant understanding of the issue and its societal importance. The unfortunate reality is that a number of powerful men in this society, men of the full spectrum of political viewpoints, have chosen to not put themselves on the line on this issue, and have continued their membership in these discriminatory institutions which pride themselves on excluding whole classes of people. Knowing Sacramento as I do, I place a great deal of positive weight on Kennedy's 1980 decision to leave the Sutter Club.

Because Anthony Kennedy is both open to discussion and open minded, I am sure the concerns expressed during these hearings will be taken in and reflected upon by him over a long period of years. To be able to consent to the nomination of a person who is genuinely open, who loves the study of law but also has a real world sense of the impact of the law on individual people, and who is deeply concerned about fairness, suggests that the Senate and this Committee have exercised the Senate's constitutional role in a positive, highly significant way.

I very much appreciate this opportunity to appear before you to urge that the Senate consent to the President's nomination of Anthony M. Kennedy.

The CHAIRMAN. Thanks. Dean, who was that?

Ms. PRAGER. Thomas Kuckel.

The CHAIRMAN. You all have known Judge Kennedy for somewhere between 8 and I guess 30 years.

Can any of you shed any light on how Judge Kennedy felt about the major decisions of the time as they came down, whether it was in the early 1970s, in the *Roe* case, or in any other case.

Can any of you shed any light on how he thought or spoke of or reacted to any of those cases?

Mr. SCHABER. I am sitting here trying to think of that, Senator. Because those cases, of course, were discussed with his students.

And I think that he always played the role of both sides of the issue. And I do not recall particular conversations in which he expressed his approval or disapproval.

The CHAIRMAN. Ms. Perdue, you clerked for the Judge. You hear some fairly straightforward and tough testimony about Judge Kennedy as it relates to gender discrimination.

Tell us what you—you made a concluding comment, not much more than a sentence about it. Tell me, if you will, your experience with Judge Kennedy how did he feel about the insensitivity shown by many to women?

And did he demonstrate any insensitivity or discrimination against women in either his decisions or his utterances or his actions toward you or anyone else?

Ms. PERDUE. During the period that I clerked for him, as far as I can recollect, there were not any cases pending before him involving gender discrimination.

And so it did not come up as an issue before him.

With respect to the private clubs issue, it was something I was completely unaware of. It was not enough a part of his life that it was apparent to a clerk. And I was frankly surprised.

My experiences, I can only respond to the question as to how did he act. How did he conduct himself? My coclerk was a male. We were treated as colleagues.

That in itself, incidentally, I found somewhat surprising, given at that point my youth and inexperience, that a judge of the court of appeals would treat his clerks with the level of respect that he did, and accord our ideas with the level of respect that he did.

But there was never any indication that I saw that he viewed—that he had gender bias. He simply treated us as equals. He sought out our views. He distributed the work equally.

And it simply did not seem to be a part of his life to treat people differently.

The CHAIRMAN. Ms. Prager, is it your testimony then that you do not believe that Judge Kennedy would jeopardize the progress that has been made in reviewing gender discrimination under the equal protection clause? Or that he might—do you have doubts about how he would treat gender discrimination cases under the equal protection clause?

Ms. PRAGER. I have some concern that runs beyond those cases, and that comes out of the voting rights case as well, that Judge Kennedy thus far, I think, places a lot of emphasis on the motives that relate to the discrimination.

And I think in that sense he is not at this point as appreciative as I might like him to be about the subtleties of discrimination in this culture, whether it relates to women or minorities or gays.

But I do think that he is a person who has a deep respect for the advancement of the law thus far in these areas, and I do not think we are going to see any backtracking on where we are.

Now that is a very subjective impression on my part.

The CHAIRMAN. Well, that is what I asked you. I understand that. And I realize that none of us know what another person is going to do.

Ms. PRAGER. And this is where I think I come back in my own thinking about this to his qualities of studiousness and deep interest in the law and genuine, I think, openness.

This is a person who I think is going to keep thinking over time, and reevaluating. And what I came down to in these last 7 months is that that was the quality that I was looking for the most.

Mr. SCHABER. Senator Biden?

The CHAIRMAN. Yes, Dean.

Mr. SCHABER. Might I just add that on December the 3rd of 1987, the Sacramento Bee, certainly a liberal newspaper, stated in an editorial concerning this exact matter the fact that Kennedy's actions in the matter of clubs, and his articulate explanation of the performance by him, reflect, "in our opinion, not dogged chauvinism, but a conscientious attempt to become sensitive to an issue that has recently overtaken a great many people of his age and background.

"On that score, Kennedy is precisely the kind of person the country needs if things are really going to change, both in the community and in the court."

I personally feel that is the case. I think his sensitivity has obviously increased in the time when, as a matter of fact, it is increasing quite appropriately in the minds and the hearts of many of us.

The CHAIRMAN. Would it be fair to say that Judge Kennedy was considered part of the establishment in Sacramento?

Mr. SCHABER. I suppose if the establishment consists of——

The CHAIRMAN. The most important people in the community; the ones with the most money and power.

Ms. PRAGER. That is an easy yes, right, Gordon?

Mr. SCHABER. A, I would say that the answer is, A, the money, no, and the power, no. Coming from a long and distinguished family and having a mother who was known as the Sacramentoan of the year and who was engaged in every kind of social and other good that one could think of, to that extent he was well known; but not the power structure.

The CHAIRMAN. Senator?

Senator HEFLIN. He was a Republican, wasn't he?

Mr. SCHABER. Yes, sir. But that is a difference between some of us.

Senator HEFLIN. I appreciate each of you being here. I appreciate your testimony. It is nice to see my old friend Professor Levin. I think he has a record of having appeared before the Judiciary Committee more than any individual. We have seen him many, many times. We appreciate it.

Judge Schaber, you mentioned the matter pertaining to the divorce case and the contingent fee. As I tried to make it abundantly clear, there is no rule or anything there that was a violation. And I do not mean to imply anything.

But it is, and perhaps maybe not coming from a community property State, but it does raise some issue, I think, in a person's mind, that community property State, that cases are taken on a contingent fee basis.

And tell us, if you would, since you said you have handled that, if you would like to respond to that particular aspect of it.

Mr. SCHABER. Even at that time it was an unusual activity. However, the case itself, as I understand it, was the case of another lawyer.

And as I mentioned, Judge Kennedy became a skilled trial practitioner. The other lawyer associated Judge Kennedy in order that Judge Kennedy would do the major trial work.

Therefore, as I understand it, the fee arrangements that normally had been made originally with the original engaging lawyer, and then with the firm in which Judge Kennedy was, of course, a partner.

At that time, as you said this morning, there was no rule even suggested—American Bar rule of professional responsibility that applied; and there was none in California.

The case involved a situation in which, as I recall, there was a very, very rich man who claimed that his wife had not one cent coming as a result of a divorce by virtue of various pieces of conduct which allegedly created all of the property to be separate.

And I assume that the original lawyer at that time—it was not uncommon but not necessarily done in every case—took this kind of a settlement fee.

The case went on for many years, as your records will show. It was very successfully done. And the woman involved obtained a very fair settlement. And fair settlement, far beyond the contingent fee.

That is not to justify it. We do not—none of us approve of that any more. It is not done any more. But to set the circumstances, that is about the way the case developed.

Senator HEFLIN. In other words, he was not the contracting lawyer.

Mr. SCHABER. No.

Senator HEFLIN. The contract had been entered into before he became associated with it? Well that is good.

Mr. SCHABER. He became a part of the contract, of course.

Senator HEFLIN. I am glad you clarified that, that is good.

Professor Levin, you dealt with him. And in some of the readings about Judge Kennedy, he was highly praised for instituting in the ninth circuit a staff attorney system that worked quite well there.

There are so many questions that we would have liked to have asked, but time is precious to us, again, due to the fact that we are trying to finish this before we leave for the Christmas holidays. And the other thing is, time on the floor.

Would you comment largely on that? Because I am, as you know, interested in the administration of justice. And I think in the

scheme of things, the members of the Supreme Court play a vital role in trying to improve the administration of justice.

I gather you are familiar with that?

Mr. LEVIN. Thank you, Senator, for that opportunity. And you understate it tremendously when you say you are interested in the administration of justice. I think it is well known that you are one of the major contributors in this half century in the State area.

I am familiar with that particular project. I happen to have known and know fairly well the first staff attorney. And he worked directly under Judge Kennedy, and had only the highest praise for Judge Kennedy's abilities, interest, careful supervision.

He is clearly one who is not only concerned with judicial administration, effective delivery of justice, but is creative about it, and has a pragmatic touch as well.

So you have got both the intellectual side and the pragmatic side.

And I will say that project has worked very well. It in some variations has been exported to other circuits. And I think that is one thing of which Judge Kennedy can be very proud.

I will say that there are other areas involving judicial administration. The pacemaker case is one in which Judge Kennedy has written. That involved the power of magistrates.

And it showed a tremendous sensitivity, not so much in the holding—it was an en banc—but in the notion—it was a problem of the authority of a magistrate to preside over a civil trial by consent of the parties.

And one of the things—we read the opinion recently, and such a marvelous sensitivity—he said, here there is consent. We are not prepared to decide the case where the consent is a result of undue delay in the system.

We do not need to reach that. But raising that is a problem.

I thought it showed very nice sensitivity in that area as well.

Senator HEFLIN. Thank you.

The CHAIRMAN. Thank you very much.

I appreciate your testimony. I apologize, we were doing a little committee business there. And as I said, particularly those of you who came from California, and those of you who walked up the street from Georgetown, and those who came—would you do me a favor, Professor Levin. You are at the University of Pennsylvania Law School. My son is at the undergraduate school. His exams start on Thursday. Would you check on him when you go back to school.

Mr. LEVIN. We in the faculty, Mr. Chairman, are happy when the students are not checking on us. But I am sure he is doing very well.

Mr. SCHABER. Senator, before you dismiss this panel, may I, on behalf of the La Raza Law Students Association, offer for the record this letter of resolution on their part, which they asked me to bring.

The CHAIRMAN. Surely.

Mr. SCHABER. It is, in effect, stating that they having had the firsthand knowledge indicate that because of his integrity and sensitivity to the minorities on the campus and in his class, "we, at a regularly scheduled meeting, unanimously voted to recommend to

you, the committee, Judge Kennedy for the United States Supreme Court."

The CHAIRMAN. Is that a standing organization on the campus?

Mr. SCHABER. Yes, it is.

The CHAIRMAN. Thank you very much. It will be entered into the record.

Mr. SCHABER. Thank you.

[Aforementioned letter follows:]

bc: Dean Schaber
Asst. Dean Chaim

LA RAZA LAW STUDENTS ASSOCIATION

December 10, 1987

The Honorable Joseph Biden
Senate Judiciary Committee
U.S. Senate, Room SR-489
Washington, DC 20510

Dear Senator Biden:

Subject: Anthony Kennedy, Supreme Court Justice Nominee

The La Raza Law Students Association is an Hispanic organization that is dedicated to social and related Hispanic issues. Very rarely do we, as aspiring law students, take valuable time from our studies to take what are many times viewed as political positions. However, the importance of the issue dictates that we express ourselves as an Hispanic organization regarding the merits of recommending Judge Anthony Kennedy to the U. S. Supreme Court.

We, as his students and future lawyers and leaders of our various communities, have first-hand knowledge of Judge Kennedy himself and his conduct on our campus. Because of his integrity and sensitivity to the minorities on campus and in class, we, at a regularly-scheduled meeting of our organization, unanimously voted to recommend Judge Kennedy to the United States Supreme Court.

We hope that you weigh our collective first-hand experiences in our relationships against those (if any) in opposition, who many times do not represent the best interests of Hispanics in the community.

Thank you for your diligent work in the confirmation process and for the consideration you give our recommendation.

Very sincerely yours,

LA RAZA LAW STUDENTS ASSOCIATION
MC GEORGE SCHOOL OF LAW

Reginald Rucoba
President

RR:bs

The CHAIRMAN. Thank you all very much. And, Dean Prager, thank you for having been of assistance to me and this committee for sometime. Thank you all.

Mr. PRAGER. Thank you.

The CHAIRMAN. The next panel is composed of five distinguished witnesses. The first is Mr. Michael Martinez, who is the national president of the Hispanic Bar Association. Second is Ms. Audrey Feinberg. Ms. Feinberg is a consultant for The Nation Institute, which has submitted a lengthy report, and a good report, analyzing Judge Kennedy's record. And third is Ms. Hernandez, who is president and general counsel of the Mexican-American Legal Defense and Educational Fund. Fourth is Mr. Henry Scott Wallace, who is the legislative director of the National Association of Criminal Defense Lawyers. And I believe we have added a fifth.

Our fifth panelist, if she is here, is Ms. Kristina Kiehl, the chairperson of Voters for Choice. She is not here. Maybe I am mistaken on that.

Well, why don't you all stand to be sworn?

Do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

[The panel responded in the affirmative.]

The CHAIRMAN. Why don't we begin with you first, Mr. Martinez. And, welcome. Good to see you again and delighted you are here.

TESTIMONY OF MICHAEL MARTINEZ, NATIONAL PRESIDENT, HISPANIC NATIONAL BAR ASSOCIATION; AUDREY FEINBERG, CONSULTANT, THE NATION INSTITUTE; ANTONIA HERNANDEZ, PRESIDENT AND GENERAL COUNSEL, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; HENRY SCOTT WALLACE, LEGISLATIVE DIRECTOR, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AND KRISTINA KIEHL, CHAIR, VOTERS FOR CHOICE

Mr. MARTINEZ. Thank you, Mr. Chairman. I am happy to be here today.

I am president of the National Hispanic Bar Association, and in the 15-year history of our association's existence this is the first time we have presented oral testimony on a U.S. Supreme Court nominee.

Our purpose in being represented at the confirmation hearings of Judge Kennedy are twofold. We wish to discuss our evaluation of his qualifications to sit on the highest court of the land, and we wish to constructively discuss Judge Kennedy's legal opinions which we believe shed light on his philosophy and understanding of the Hispanic community. We have not and do not consider whether we agree or disagree with a particular opinion of Judge Kennedy's or with his judicial philosophy. We simply evaluate as our brethren in the ABA do. We are a bar association. And we evaluate based on qualification and not, hopefully, subjective criteria.

Our judiciary committee, as well as our board of governors, has worked diligently to review Judge Kennedy's opinions. The board evaluated (1) his analytical skills, (2) his ability to communicate his ideas in an understandable fashion, (3) his sensitivity to diverse communities in our country, and (4) his judicial philosophy.

Based upon our review of his decisions and writings we have come to the following conclusions and observations. In general, there is no doubt that Judge Kennedy has the intellectual capacity to be a U.S. Supreme Court Justice. His analytical skills are documented throughout his distinguished career. He has the ability to communicate in a clear and concise manner. He also understands the laws which have come before him. It is clear that experience and hard work have made Judge Kennedy a credit to our legal profession.

A review of his opinions also sheds light on his personal judicial philosophy and view of our social institutions. These opinions reflect a person that in some instances gives deference to institutions over individuals. A man who believes that individuals should bring their own actions rather than allow non-injured third parties to vindicate the rights of others.

Since our interest and concerns are much broader than civil rights, we do not seek to label Judge Kennedy as pro or con civil rights or minority or Hispanic interests. Instead, we seek to evaluate him on neutral criteria which gives us an indication of the overall quality of a Supreme Court Justice. However, cases involving civil rights or brought by or on behalf of minorities are of particular interest to our association, and in this case they disclose Judge Kennedy's lack of a clear understanding of some of the problems faced by us in the Hispanic community.

For instance, in the *TOPIC* v. *Circle Realty* case, decided in 1976, Judge Kennedy held that only direct victims of discriminatory housing practices had a cause of action. His reasoning in this case is plausible, but only if one viewed the 1968 Fair Housing Act in a vacuum. As this panel knows, that decision was overruled by the U.S. Supreme Court because, in fact, the Fair Housing Act was not intended to be interpreted in a vacuum.

In *Aranda* v. *Van Sickle*, decided in 1979, Judge Kennedy again turned to a very narrow interpretation of the law. Although acknowledging impediments to Hispanics voting in municipal elections, he ultimately ruled in favor of the municipality, while at the same time leaving the door open in the event of some future violations of law.

In *Spangler* v. *Pasadena City Board of Education*, decided in 1979, Judge Kennedy concurred in a decision terminating jurisdiction of the court over a school system previously ordered to correct racial segregation practices. Once again Judge Kennedy based his opinion upon a narrow interpretation of the law and gave deference to the school administration's good faith efforts. As in *Aranda*, the judge left the door open for future action if the alleged discriminatory practices were not remedied. This is not a practical solution because it is costly, time consuming, and in the case of many Hispanics it is simply not available to them to return to the courthouse.

The above cases make a statement about Judge Kennedy. He believes in our system of government and perhaps gives undue deference to institutions. Hispanics more often than not also give deference to our institutions; however, Hispanics do not have the monetary or educational attainment to be able to singlehandedly vindicate their rights or even to often recognize when their rights have been violated. Sometimes Hispanics must look to public interest organizations for assistance in vindicating their rights, as occurred in the *TOPIC* case.

Sometimes discrimination is not overt, as in the *Aranda* case. Sometimes discrimination is subtle, but can and must be remedied. Simply leaving the door open for a return visit to the court as Judge Kennedy has done in his opinions is not a very practical solution for the pressing needs, the immediate pressing needs of the Hispanic community.

Although we only have time to discuss a few cases, they are instructive in that they demonstrate that Judge Kennedy is cognizant of the discrimination faced by many in our society. Many of the problems faced by Hispanics cannot be solved by blind and unquestioning faith in the system. Judge Kennedy should understand that those that are most affected by systemic failures are the least able to vindicate their rights.

Based on the standards previously enunciated, we know Judge Kennedy is qualified to be a Supreme Court Justice. His analytical skills, his ability to communicate, and his judicial philosophy speak highly of his professionalism and legal abilities. Our association understands that no nominee for the U.S. Supreme Court comes to this Senate Judiciary Committee with a clean slate. However, we urge him to become more familiar with our Hispanic community. We have every confidence that Judge Kennedy will serve with dis-

tinction as our U.S. Supreme Court Justice, and our association is prepared to assist him whenever possible.

I wish to thank you, Mr. Chairman, and the other members of the Senate Judiciary Committee for the opportunity to express the views of our association on such an important nomination, and I look forward to appearing before you in the very near future to comment on the nomination of a Hispanic for a Justice of the U.S. Supreme Court.

Thank you.

[The statement of Michael Martinez follows:]

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HISPANIC NATIONAL
BAR ASSOCIATION

TESTIMONY
BEFORE U.S. SENATE
JUDICIARY COMMITTEE

CONCERNING

JUDGE ANTHONY KENNEDY
NOMINATION TO THE
U.S. SUPREME COURT

DECEMBER 16, 1987

1634 EYE STREET N.W. 9th FLOOR WASHINGTON, D.C. 20006 (202)628-7169

Thank you, Mr. Chairman, I am Michael Martinez, President of the Hispanic Bar Association. In the 15 year history of the Hispanic National Bar Association (HNBA) this is the first time we have presented oral testimony on a U.S. Supreme Court nominee. The Hispanic Bar greatly appreciates this opportunity to testify, and we are cognizant of the duty to express our frank concerns.

The goals of the HNBA include fostering respect for the law, advancing the development of Hispanic attorneys and supporting changes within our system of justice which better the lives of Hispanics and the United States in general. To accomplish these goals the Hispanic National Bar Association works closely with the American Bar Association through its representative delegate to the ABA House of Delegates. The HNBA also works closely with all segments of the legal profession to encourage and support understanding of the problems faced by our members and the Hispanic community in general in pursuing equal justice under the law. Hispanics, as you know, are underrepresented in the halls of Congress as well as in the courts. This status is not acceptable to the HNBA membership, to our clients, or to our Hispanic constituency.

Our purpose in being represented at the confirmation hearings of Judge Kennedy are twofold. We wish to discuss our evaluation of his qualifications to sit on the highest court of the land and we wish to constructively discuss Judge Kennedy's legal opinions which we believe shed light on his

philosophy and understanding of the Hispanic community. We have not and do not consider whether we agree or disagree with a particular opinion of Judge Kennedy or with his judicial philosophy. We simply evaluate, as our brethren in the ABA do, based upon qualification and not subjective criteria. Our Judiciary Committee and our Board of Governors has worked diligently to review Judge Kennedy's opinions. The Board evaluated his (1) analytical skills, (2) ability to communicate his ideas in an understandable fashion, (3) sensitivity to diverse communities, and (4) judicial philosophy. Based upon our review of his voluminous decisions and writings we have come to the following conclusions and observations.

In general, there is no doubt that Judge Kennedy has the intellectual capacity to be a Supreme Court Justice. His analytical skills are documented throughout his distinguished career. He has the ability to communicate in a clear and concise manner. He also understands the laws which have come before him. It is clear that experience and hard work have made Judge Kennedy a credit to our profession.

A review of his opinions also sheds light on his personal judicial philosophy and view of our social institutions. These opinions reflect a person that in some instances gives deference to institutions over individuals, a man who believes that individuals should bring their own

actions rather than allow non-injured third parties to vindicate the rights of others.

Since the HNBA's interests and concerns are much broader than civil rights, we do not seek to label Judge Kennedy as "pro" or "con" civil rights or minority interests. We seek to evaluate him on neutral criteria which gives us an indication of the quality of U.S. Supreme Court Justice he will be. However, cases involving civil rights violations or brought by, or on behalf of, minorities are of particular interest to the HNBA and in this case disclose Judge Kennedy's lack of clear understanding of some problems faced by the Hispanic community.

For instance, in the Topic v. Circle Realty case, decided in 1976, Judge Kennedy held that only direct victims of discriminatory housing practices had a cause of action. His reasoning in Topic is plausible only if one views the 1968 Fair Housing Act in a vacuum. As this panel knows, however, that decision by Judge Kennedy was overruled by the U.S. Supreme Court because, in fact, the Fair Housing Act was not intended to be interpreted in a vacuum.

In Aranda v. Van Sickle, decided in 1979, Judge Kennedy again turned to a narrow interpretation of the law. Although acknowledging impediments to Hispanics' voting in municipal elections, he ultimately ruled in favor of the municipality, while at the same time only leaving the door slightly open in the event of some violations of law.

In Spangler v. Pasadena City Board of Education, decided in 1979, Judge Kennedy concurred in a decision terminating jurisdiction of the court over a school system previously ordered to correct racial segregation practices. Once again, Judge Kennedy based his opinion upon a narrow interpretation of the law and gave deference to the school administration's good faith efforts. As in Aranda the judge left the door open for future action if the alleged discriminatory practices were not remedied. This is not a practical solution because it is costly, time-consuming, and in the case of many Hispanics simply unavailable.

The above cases make a statement about Judge Kennedy. He believes in our system of government and perhaps gives undue deference to institutions. Hispanics more often than not also give deference to our institutions. However, Hispanics do not have the monetary or educational attainment to be able to single-handedly vindicate their rights or even to recognize when their rights have been violated. Sometimes Hispanics must look to public interest organizations for assistance in vindicating their rights, as occurred in the Topic case. Sometimes discrimination is not overt, as in Aranda. Sometimes discrimination is subtle, but can and should be remedied. Simply leaving the door open for return visits to the court as Judge Kennedy has done in his opinions is not a practical solution to the pressing needs of the Hispanic community.

Although we only have time to discuss a few cases, they are instructive in that they demonstrate that Judge Kennedy is cognizant of the discrimination faced by many in our society. Many of the problems faced by Hispanics cannot be solved by blind and unquestioning faith in the system. Judge Kennedy should understand that those that are most affected by systematic failures are the least able to vindicate their rights.

Based on the standards previously enunciated, we know Judge Kennedy is "Qualified" to be a Supreme Court Justice. His analytical skills, his ability to communicate and his judicial philosophy speak highly of his professionalism and legal abilities. HNBA understands that no nominee for the U.S. Supreme Court comes to the U.S. Senate Judiciary with a clean slate. However, we urge him to become more familiar with our Hispanic community. We have every confidence that Judge Kennedy will serve with distinction as our United States Supreme Court Justice, and the HNBA is prepared to assist him whenever possible.

We wish to thank the Chairman of the United States Senate Judiciary Committee and all the members of the Committee for the opportunity to express our views on such an important nomination. We look forward to appearing before you in the near future to comment on the nomination of a Hispanic for Justice of the Supreme Court of the United States.

The CHAIRMAN. I am looking forward to that day, also.

Let me suggest, as I understand there is a scheduling problem for two members of the panel. I am advised this is important enough that they would stay and miss their planes, and they have indicated they are willing to do that. But I would like, if the rest of the panel would agree, to go Ms. Hernandez next, because I understand both of you have a 6 o'clock airplane—is that correct? And I see no reason, if you all don't mind, why we shouldn't go to you next. Then what I might do is ask you questions first, also, to give you an opportunity because I would not count on the traffic here, your making the plane, if we wait till the end of the panel.

But, please. And I thank the rest of the panel for their indulgence.

Ms. HERNANDEZ. Thank you, Mr. Chairman. My name is Antonia Hernandez, and I am the president and general counsel of the Mexican-American Legal Defense Fund. I thank you and the members of the committee for giving me the opportunity to testify on behalf of MALDEF on the nomination of Judge Anthony Kennedy to be an Associate Justice of the Supreme Court of the United States.

I am here to express concerns, and our concerns are real and they are indeed serious. They stem from such facts as Judge Kennedy's membership in private clubs that had not admitted into membership Hispanics, other minorities and women; and they are based on the fact that although he has employed 35 law clerks, Judge Kennedy has never found himself able to employ an Hispanic or a black.

My grave concerns, however, are primarily based on several of Judge Kennedy's judicial decisions on civil and constitutional rights in which he denied access to the courts to minorities, in which he denied the right to a trial to minorities, and in which he ruled against minorities by disregarding settled rules governing the scope of appellate review.

I have submitted an extensive written record. Today, in my oral statement I will address, primarily, two matters: first, the historical importance of the Supreme Court to vindicating the rights of Hispanics; and, secondly, Judge Kennedy's involvement in several judicial opinions, particularly in the *Aranda* v. *Van Sickle* decision that MALDEF litigated.

The history of discrimination against Hispanics in this country, particularly in the Southwest and particularly from the mid-19th century to date, has been not unlike that suffered by blacks. We Hispanics have been subjected to segregation in schools, in restaurants, and in hotels. We have been denied employment and often treated badly when employed. We have been denied the opportunity to serve on juries, and we have been denied the most fundamental of rights, the right to vote.

Our fight to restore our basic civil rights has not been an easy one; and, in fact, it has required MALDEF and other attorneys to file and litigate hundreds of lawsuits, and a number of our lawsuits have ended up in the U.S. Supreme Court. A prime example is the voting rights case of *White* v. *Regester,* where a unanimous Supreme Court struck down Texas' imposition of a multi-member leg-

islative district in Bexar County, a heavily Hispanic county where San Antonio is located.

Based on such facts and the reality that only five Hispanics in nearly 100 years had ever been elected to the Texas legislative body from Bexar County, the Supreme Court upheld our claim that the multi-member district diluted the vote of Hispanics in violation of the 14th amendment, and the Court thus affirmed the redrawing of the single-member districts. And, as you all know, as a consequence of that, we have a dynamic young Hispanic mayor, Henry Cisneros, and the majority of the city council is minority—five Hispanics, one black. And I have other examples of the consequences of our litigation in that area.

The CHAIRMAN. He may be your first Hispanic President.

Ms. HERNANDEZ. Probably so, and I look forward to that day.

In *Doe* v. *Plyler* we challenged Texas' denial of a public school education to undocumented Hispanic children. These children were Texas residents, most of whom would eventually become legal residents, but who, without an education would become a permanent underclass. The Supreme Court in this case agreed that Texas' policy was unconstitutionally discriminatory in violation of the 14th amendment. But the Court reached this decision through a bare 5-4 majority, with Justice Powell joining the majority. With Justice Powell no longer on the Supreme Court and with the future of the Supreme Court hanging in the balance, we are indeed concerned about his possible replacement. I am particularly concerned about the fairness of the person nominated to succeed Justice Powell, and it is for that reason that we consider this particular vacancy of serious importance.

In several cases Judge Kennedy's opinions reflect not only a deviation from precedent, but also unfairness, and even a serious insensitivity to the rights of minorities. The point of my grave concern about these adverse opinions is not just that he ruled against civil rights plaintiffs in cases that I firmly believe could have been and should have been ruled upon differently, but rather my serious concern arises primarily from the manner in which he reached his results adverse to civil rights.

Aranda v. *Van Sickle* is a case in point. *Aranda* is a vote dilution case similar to the Supreme Court case of *White* v. *Regester*, and I might say almost identical. But Judge Kennedy reached a result different from that reached by the unanimous Supreme Court.

The Hispanic plaintiffs in *Aranda* challenged the at-large election used by the city of San Fernando, California. As of the early 1970's, the population of San Fernando had grown to become almost 50 percent Hispanics. Twenty-nine percent were registered voters, and yet only three Hispanics had ever been elected at large since the city had incorporated in 1911 to the five-member city council.

The plaintiffs also alleged that there was a history of discrimination against Hispanics, and that the political process was not equally open to Hispanics. For example, more than half of the polling places had been ordinarily located in homes of Anglos outside of the barrio community and, as you know, it is extremely difficult for minority members to go to a different hostile neighborhood to cast a vote.

Despite these allegations the district court summarily dismissed the case, thereby denying the plaintiffs their day in court to prove their case at trial. The ninth circuit affirmed the summary dismissal in a majority opinion which set forth few of the facts, which contained little legal analysis, and which primarily adopted the district court findings. And I must emphasize that what was of particular interest in this case is that Judge Kennedy filed a concurring opinion in which he filled in the facts and provided the precedential analysis missing from the majority opinion.

This concurring opinion is remarkable in at least two respects. First, Judge Kennedy never discussed the Supreme Court's stringent legal principle disfavoring summary dismissals. Judge Kennedy accordingly circumvented established Supreme Court precedent possibly so as to reach the results he desired. Secondly, Judge Kennedy itemized the plaintiffs' many factual allegations and then concluded that such plaintiffs could never win, and I quote:

"Assuming that plaintiffs' factual allegations are true, when taken together, they would not permit a reasonable person to infer that the at-large system for electing the mayor and city council members is maintained because of an invidious intent."

Since the fact patterns underlying most at-large elections in California and in other States within the ninth circuit were no more egregious than the facts alleged by the Hispanic plaintiffs in this case, Judge Kennedy's basic conclusion effectively ended constitutional challenges to at large elections within the ninth circuit. And so, to us, it was not so much the reversal but the logic and the processes used. And as a consequence of that, you have seen from many of his decisions the preclusion of challenges to at-large election systems in the State of California and in the ninth circuit.

[The statement of Antonia Hernandez follows:]

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MALDEF

STATEMENT OF ANTONIA HERNANDEZ

On Behalf Of The

Mexican American Legal Defense and Educational Fund

("MALDEF")

In The Nomination Of

Judge Anthony M. Kennedy

To Be An Associate Justice Of The

Supreme Court Of The United States

Senate Committee On The Judiciary

United States Senate

December 16, 1987

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STATEMENT OF ANTONIA HERNANDEZ

Mr. Chairman, distinguished members of the Judiciary Committee:

I am pleased to have the opportunity today to present testimony on behalf of the Mexican American Legal Defense and Educational Fund ("MALDEF") concerning the nomination of Judge Anthony Kennedy to be an Associate Justice of the Supreme Court of the United States.

My name is Antonia Hernandez. I am President and General Counsel of the Mexican American Legal Defense and Educational Fund ("MALDEF"). I am here before you today because I have grave concerns about how Judge Kennedy -- if he were confirmed by the Senate to become an Associate Justice -- would view the claims of discriminated-against Hispanics in the important civil and constitutional rights cases which come before and are decided by the United States Supreme Court.

My concerns are real, and they are indeed serious. They stem from such facts as Judge Kennedy's membership in private clubs that had not admitted into membership Hispanics, other minorities, and women. And they are based on the fact that although he has employed thirty-five law clerks, Judge Kennedy has never found himself able to employ an Hispanic or a black law clerk. Furthermore, the sum total of Judge Kennedy's minority employment consists of five women and one Asian law clerk.

My grave concerns, however, are primarily based on several of Judge Kennedy's judicial opinions on civil and constitutional rights in which he denied access to the courts to minorities, in which he denied the right to a trial to minorities, and in which he ruled against minorities by disregarding settled rules governing the scope of appellate review.

In this Statement, I address hereafter primarily two matters: (1) the historical importance of the Supreme Court to vindicating the rights of Hispanics; and (2) Judge Kennedy's several judicial opinions rejecting the rights of Hispanics and of other minorities.

I. THE HISTORICAL IMPORTANCE OF THE SUPREME COURT TO HISPANICS

The history of discrimination against Hispanics in this country, particularly in the Southwest and especially from the mid-Nineteenth Century to date, has been not unlike that suffered by blacks. We Hispanics have been subjected to segregation in schools, in restaurants, and in hotels. We have been denied employment, and when employed, we have been intimidated and harassed, denied promotions, training and other opportunities. We have been denied the opportunity to serve on juries. And we have even been denied the most fundamental of rights: the right to vote.

But in 1954, Hispanics, blacks and other minorities in our country, were finally given hope by the United States Supreme Court. In fact, two weeks prior to the Supreme Court's unanimous

ruling in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (holding school segregation unconstitutional), the Supreme Court applied the protections of the Fourteenth Amendment to Mexican Americans in Hernandez v. Texas, 347 U.S. 475 (1954), unanimously holding that the exclusion of Mexican Americans from juries in Texas violated the Fourteenth Amendment's equal protection clause. In subsequent years, it again was the Supreme Court -- and thereafter also Congress -- that continued to recognize some of our basic civil rights.

This fight to establish our basic civil rights has not been an easy one. It in fact has required MALDEF attorneys to file and to litigate hundreds of lawsuits. And a number of our lawsuits have ended up in the United States Supreme Court.

A prime example of this is the voting rights case of White v. Regester, 412 U.S. 755 (1973). In this case, a unanimous Supreme Court struck down Texas' imposition of a multimember legislative district in Bexar County, a heavily Hispanic county where San Antonio is located. Based on such facts as the reality that only five Hispanics in nearly 100 years had ever been elected to the Texas Legislature from Bexar County, the Supreme Court upheld our claim that the challenged multimember district scheme diluted the votes of Hispanics in violation of the Fourteenth Amendment, and the Court thus affirmed the remedial redrawing of single member districts.

Apart from the Supreme Court's decision in White and its earlier decision in Hernandez, few of our victories have been the

result of unanimous decisions by the Supreme Court. Instead -- and increasingly in the past decade -- we have faced a divided Supreme Court, a Court which in fact has often been very closely divided on issues of special importance to Hispanics.

For example, in Plyler v. Doe, 457 U.S. 202 (1982), we challenged Texas' denial of a public school education to undocumented Hispanic children. These children were Texas residents most of whom would eventually become legal residents, but who, without an education, would become a permanent underclass. The Supreme Court in this case agreed that Texas' policy was unconstitutionally discriminatory in violation of the Fourteenth Amendment. But the Court reached this decision through a bare 5-4 majority, with Justice Powell joining that majority.

With Justice Powell no longer on the Supreme Court, and with the future of the Supreme Court hanging in the balance, I am of course concerned about his possible replacement, and I am particularly concerned about the capacity for fairness and compassion of the person nominated to succeed Justice Powell.

II. JUDGE KENNEDY'S SEVERAL JUDICIAL OPINIONS ADVERSE TO THE RIGHTS OF HISPANICS

In his twelve years on the United States Court of Appeals for the Ninth Circuit (which encompasses nine states, including the states of California, Arizona, and Nevada), Judge Anthony Kennedy has authored nearly 500 judicial opinions. Roughly a dozen of his opinions, narrowly speaking, have had a particular

impact on the rights of Hispanics and of other minorities.

In reviewing these opinions, my staff and I have determined that Judge Kennedy, whether ruling for or against civil rights litigants, has in many instances carefully followed and applied settled law or judicial precedent. (Several of these opinions, in which he ruled in favor of civil rights litigants, are summarized and analyzed in Appendix B to this Statement.) In these instances at least, Judge Kennedy has demonstrated not only his adherence to precedent but his fairness as well.

In several other instances, however, Judge Kennedy's opinions reflect not only a deviation from precedent but also unfairness and even a serious insensitivity to the rights of minorities. (Several of these opinions, all adverse to the civil rights plaintiffs, are summarized and analyzed in Appendix A to this Statement.)

The point of my grave concern about these adverse opinions is not just that he ruled against civil rights plaintiffs in cases that I firmly believe could have been and should have been ruled upon differently. Rather, my serious concern arises primarily from the manner in which he reached his results adverse to civil rights.

Three of Judge Kennedy's opinions deserve, in my view, particularly close scrutiny.

A. Housing Discrimination, and Access to the Courts

TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976)

(Kennedy, joined by Chambers and Trask), cert. denied, 429 U.S. 859 (1977), is a housing discrimination case.

The plaintiffs, a fair housing organization and three individual homeowners, alleged that they were being denied the opportunity to live in integrated neighborhoods because of the racial steering practices of various real estate brokers. They sued the brokers directly in federal court under the federal Fair Housing Act. The defendants moved to dismiss the lawsuit on the grounds that the plaintiffs allegedly had not been sufficiently injured so as to be able to sue in court. The District Court disagreed and refused to dismiss the lawsuit.

On appeal, Judge Kennedy reversed the District Court and directed that the case be dismissed.

To reach this result, Judge Kennedy had to distinguish the Supreme Court's decision in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972), in which the Supreme Court recognized the injury-in-fact "standing" of apartment tenants to challenge a landlord's similar steering under the Fair Housing Act.

Judge Kennedy's narrow views were squarely rejected by the Supreme Court three years later in Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), in a 7-2 opinion by Justice Powell. In the course of that opinion, Justice Powell pointed out that his allowance of access to the courts was supported by nine federal court decisions. Id. at 108. "The notable exception is the Ninth Circuit in TOPIC v. Circle Realty." Id. Justice

Powell continued: "[T]he Court of Appeals in this case correctly declined to follow TOPIC." Id. at 109.

B. Voting Discrimination, The Right to a Trial, and Appellate Review

Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979) (Barnes with Voorhees, and Kennedy concurring), aff'g 455 F. Supp. 625 (C.D. Cal. 1976), is a vote dilution case similar to the Supreme Court case of White v. Regester, 412 U.S. 755 (1973). But Judge Kennedy reached a result different from that reached by the unanimous Supreme Court.

The Hispanic plaintiffs in Aranda challenged the at-large elections used by the city of San Fernando, California. As of the early 1970s, the population of San Fernando had grown to become 50% Hispanic; 29% of the registered voters were Hispanic; and yet since the city's incorporation in 1911 only three Hispanics had ever been elected at large to the five-member City Council. The plaintiffs also alleged that there was a history of harassment and discrimination against Hispanics, and that the political process was not equally open to Hispanics. For example, more than half of the polling places had been ordinarily located in the homes of Anglos while pollings places had seldom been located in Hispanic homes.

Despite these allegations, the District Court summarily dismissed the case, thereby effectively denying the plaintiffs the opportunity to present their case at trial.

The Ninth Circuit affirmed the summary dismissal in a

majority opinion which set forth few of the facts, contained little legal analysis, and which primarily adopted the District Court's opinion.

Judge Kennedy filed a concurring opinion in which he filled in the facts and provided the precedential analysis missing from the majority opinion. His concurring opinion is remarkable in at least two respects.

First, Judge Kennedy never discussed the Supreme Court's stringent legal principles disfavoring summary dismissals. Judge Kennedy accordingly circumvented established Supreme Court precedent, possibly so as to reach the result he desired.

Second, Judge Kennedy itemized the plaintiffs' many factual allegations, and then concluded that such plaintiffs could never win:

> Assuming that plaintiffs' factual allegations are true, when taken together, they would not permit a reasonable person to infer that the at-large system for electing the mayor and city council members is maintained because of an invidious intent.

Aranda, 600 F.2d at 1277. Since the fact patterns underlying most at-large elections in California and in the other states within the Ninth Circuit were no more egregious than the facts alleged by the Hispanic plaintiffs in this case, Judge Kennedy's conclusion effectively ended constitutional challenges to at-large elections within the Ninth Circuit.

C. School Segregation, and Appellate Review

Spangler v. Pasadena Board of Education, 611 F.2d 1239 (9th Cir. 1979) (Goodwin, with Anderson concurring, and with Kennedy concurring), is a school desegregation case.

At issue in this case was the Board of Education's request that the District Court relinquish its continuing jurisdiction on the grounds that the Board for many years had substantially complied with the court-ordered desegregation plan, and that the Board had passed a resolution promising not to engage in intentional discrimination in the future. This request was opposed by the plaintiffs and by the Justice Department because the Board in fact had been out of compliance on thirteen occasions, and primarily because recently elected Board members had expressed their intent to revoke the desegregation plan and thereby to resegregate the schools. The District Court denied the Board's request and retained continuing jurisdiction.

On the Board's appeal, the Ninth Circuit, in a short majority opinion, reversed and directed the termination of jurisdiction.

Judge Kennedy filed a lengthy concurring opinion setting forth the facts as he perceived them to be, and providing a legal analysis for the results reached. In doing so, he went far beyond the majority opinion both procedurally and as a matter of law in at least two respects.

First, Judge Kennedy substituted his version of the facts for those found by the finder of fact, the District Court. For

example, although the District Court found substantial noncompliance particularly after 1976, Judge Kennedy argued that "there has been no showing of noncompliance in any degree since that date." Spangler, 611 F.2d at 1243 (footnote omitted noting thirteen instances of noncompliance). Additionally, on the resegregation issue, Judge Kennedy acted as the trier of fact in finding that "the evidence does not support the conclusion that the school board harbors an intent to establish, or return to, a dual system." Id. at 1244. The problem with these conclusions is that Judge Kennedy never cited, and indeed circumvented, the Supreme Court's stringent principles which delegate fact finding to the District Courts.

Second, at somewhat of a loss to cite controlling law in support of his legal conclusion on the termination of jurisdiction, Judge Kennedy quoted from the Supreme Court's decision in Spangler several years earlier:

> At oral argument the Solicitor General discussed the Government's belief that if, as [the Board defendants] have represented, they have complied with the District Court's order during the intervening two years [from 1974 to 1976], they will probably be entitled to a lifting of the District Court's order in its entirety. Tr. of Oral Arg. 28-31.

Spangler, 611 F.2d at 1243 (brackets by Judge Kennedy), quoting from Pasadena Board of Education v. Spangler, 427 U.S. 424, 441 (1976). The problem with Judge Kennedy's reliance on this

quotation is that it was not adopted as law then by the Supreme Court, and it is not now the law. Instead, it was no more than an argument by Solicitor General Robert H. Bork.

III. CONCLUSION

I no doubt need not stress to this Committee that Hispanics, and other minorities too, are deeply concerned about the prevalence of discrimination in the sale and rental of the very housing we need for our families; about our right not just to vote, but to a vote that counts; and about segregation and resegregation of our children in our country's public schools. In order to fight ongoing discrimination and injustice, we Hispanics and other minorities need access to the courts, as well as to our "day in court" to prove discrimination and injustice. And we need Supreme Court Justices that believe in and apply the noble inscription on the Supreme Court building's facade: **EQUAL JUSTICE UNDER LAW.**

The foregoing judicial opinions rendered by Judge Kennedy, and in particular the way in which he reached his results, have quite naturally caused me to conclude that Judge Kennedy -- if he becomes Associate Justice Kennedy on the Supreme Court -- may not be fair in adjudicating the rights of Hispanics and of other minorities. Alas, this possible unfairness could become particularly prevalent in cases not subject to compelling judicial precedent.

Many of you have read and analyzed the foregoing opinions,

among others. I am not yet convinced whether Judge Kennedy would be fair in adjudicating the rights of Hispanics and other minorities. I urge the Committee to seek further clarification and assurance--on the record--concerning his views on civil rights and on the rights of Hispanics.

APPENDIX A

A SUMMARY AND ANALYSIS OF SEVERAL OF JUDGE KENNEDY'S OPINIONS ADVERSE TO CIVIL RIGHTS

APPENDIX A

In a number of his judicial opinions, on issues of particular importance to the civil rights and constitutional rights of Hispanics, Judge Kennedy has denied access to the courts, denied the right to a trial, and has disregarded settled judicial precedent on the scope and nature of appellate review. Four such opinions are summarized and analyzed hereafter: one each in the areas of housing discrimination; vote dilution and the right to vote; school segregation; and employment discrimination.

1. TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976) (Kennedy, joined by Chambers and Trask), cert. denied, 429 U.S. 859 (1977).

This housing discrimination case was filed under the Fair Housing Act. Judge Kennedy denied injury-in-fact standing to the individual and organizational plaintiffs. His anti-civil rights view was squarely rejected three years later in Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), a 7-2 decision with the majority opinion written by Justice Powell.

In TOPIC, a fair housing organization and three individual homeowners alleged that they were being denied the opportunity to live in integrated neighborhoods because of the racial steering practices of various real estate brokers. They sued the brokers directly in federal court under § 812 of the Fair Housing Act.

The District Court denied the defendants' motion to dismiss on grounds of standing. Judge Kennedy reversed and directed that the case be dismissed.

To reach this result, Judge Kennedy had to distinguish the Supreme Court's decision in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972), in which the Court recognized the injury-in-fact standing of apartment complex tenants to challenge a landlord's similar steering under (810 of the Fair Housing Act. He sought to distinguish Trafficante in two ways.

First, Judge Kennedy reached out to find that the injury allegedly suffered by the homeowners in TOPIC was probably much less direct than that suffered by the tenants in Trafficante. Having thus distinguished Trafficante in this manner, Judge Kennedy then declined to base his decision on this premise.

Second, Judge Kennedy instead limited Trafficante to it's holding under the less-used (810 of the Fair Housing Act, and held that (812 relied on in TOPIC did not authorize lawsuits by residents who had not themselves been directly discriminated against.

Both of Judge Kennedy's narrow views were squarely rejected by the conservative Burger Court three years later in Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), in a 7-2 opinion by Justice Powell. In the course of that opinion, Justice Powell pointed out that "[m]ost federal courts that have considered the issue agree that ((810 and 812 provide parallel remedies to precisely the same prospective plaintiffs." Id. at 108, citing

nine federal court decisions. "The notable exception is the Ninth Circuit in TOPIC v. Circle Realty." Id. Justice Powell continued:

> [T]he Court of Appeals in this case correctly declined to follow TOPIC. Standing under (812, like that under (810, is "as broad as is permitted by Article III of the Constitution."

Id. at 109, quoting from Trafficante, 409 U.S. at 209.

2. Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979) (Barnes with Voorhees, and Kennedy concurring), aff'g 455 F. Supp. 625 (C.D. Cal. 1976).

This vote dilution case challenged at-large elections under the Fourteenth and Fifteenth Amendments. In his separate concurring opinion which is longer than the majority opinion, Judge Kennedy provided a judicial roadmap which could have been used to preclude all future challenges to at-large elections in those states within the Ninth Circuit. If this was Judge Kennedy's intent, it became moot in 1982 when Congress amended (2 of the Voting Rights Act.

The Hispanic plaintiffs in Aranda challenged the at-large elections used by the city of San Fernando since its incorporation in 1911. As of the early 1970s, the population of San Fernando had grown to become 50% Hispanic; 29% of the registered voters were Hispanic; and yet only three Hispanics had ever been elected at large to the five-member City Council.

In addition to the foregoing, plaintiffs alleged that there was a history of discrimination against Hispanics, and that the political process was not equally open to Hispanics in that, for example, few Hispanics had ever been appointed to the City's, eighteen commissions; few Hispanics had been permitted to serve as election officials; volunteer Hispanic poll watchers were routinely harassed; more than half of the polling places were ordinarily located in the homes of Anglos while pollings places had seldom been located in Hispanic homes; racial appeals were made by Anglos in election campaigns; and all ballots and election materials were available only in English.

Despite these allegations, the District Court denied plaintiffs a trial, and granted the City's motion for summary judgment on the ground that even if plaintiffs could prove their allegations as true, this would not add up to the intentional discrimination necessary to establish liability.

The Ninth Circuit affirmed the summary judgment dismissal in a majority opinion which set forth few of the facts, which contained little legal analysis, and which primarily adopted the District Court's opinion.

Judge Kennedy filed a concurring opinion in which he filled in the facts and provided the precedential analysis missing from the majority opinion. His concurring opinion is remarkable in at least two respects.

First, although this case was decided not after trial when all the facts could have been fully developed but instead on

summary judgment. Judge Kennedy never discussed the stringent legal principles applicable to summary judgment motions. E.g., the moving party has the burden of proving that there are no material facts in dispute, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); and "all inferences to be drawn from the underlying facts contained in the [movant's] materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, 369 U.S. 654, 655 (1962) (brackets added). Judge Kennedy accordingly circumvented established Supreme Court precedent apparently so as to reach the result he desired.

Second, Judge Kennedy itemized plaintiffs' many factual allegations, and then concluded plaintiffs could never win:

> Assuming that plaintiffs' factual allegations are true, when taken together, they would not permit a reasonable person to infer that the at-large system for electing the mayor and city council members is maintained because of an invidious intent.

Aranda, 600 F.2d at 1277. Since the fact patterns underlying most at-large elections in California and in the other states within the Ninth Circuit were no more egregious than the facts alleged by the plaintiffs in this case, Judge Kennedy's conclusion effectively ended constitutional challenges to at-large elections within the Ninth Circuit. And he precluded such challenges despite the existence of similar fact patterns in

successful cases such as the Supreme Court case of White v. Regester, 412 U.S. 755 (1973).

Judge Kennedy's decision in Aranda did not, however, kill litigation challenges to at-large elections. In 1982, Congress amended (2 of the Voting Rights Act to clarify its intent that electoral practices which have a discriminatory effect are illegal. This 1982 amendment in turn was further clarified by a narrowly divided Supreme Court in Thornburg v. Gingles, ____ U.S. ____, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1976).

3. Spangler v. Pasadena Board of Education, 611 F.2d 1239 (9th Cir. 1979) (Goodwin, with Anderson concurring, and with Kennedy concurring).

This school desegregation case involved the question of whether the District Court's supervisory jurisdiction should be continued or terminated. Although Judge Kennedy agreed with the majority that jurisdiction should be terminated and the District Court decision thereby should be reversed, Judge Kennedy filed a concurring opinion (more than three times longer than the majority opinion) in which he disregarded settled judicial principles on fact finding, and in which he reached out to decide an issue which has become critical today in school desegregation litigation. This concurring opinion in Spangler is similar in many respects to his reaching-out concurring opinion in Aranda.

In this decade-old school desegregation case, the Board of Education filed a motion requesting the District Court to relinquish its continuing jurisdiction on the grounds that the

Board for many years had substantially complied with the court-approved desegregation plan, and that the Board had passed a resolution promising not to engage in intentional discrimination in the future. This motion was opposed by the plaintiffs and by the Justice Department because the Board in fact had been out of compliance on thirteen occasions, and primarily because recently elected Board members had expressed their intent to revoke the desegregation plan and thereby to resegregate the schools. The District Court retained continuing jurisdiction.

On the Board's appeal, the Ninth Circuit panel reversed and directed the termination of jurisdiction. In a short majority opinion, Judge Goodwin found that the Board had substantially complied with the desegregation plan and that it was time for jurisdiction to be relinquished. Judge Anderson agreed in a one-sentence concurrence.

Judge Kennedy filed a lengthy concurring opinion setting forth the facts as he perceived them to be, and providing a legal analysis for the result reached. In doing so, he went far beyond the majority opinion both procedurally and as a matter of law.

First, Judge Kennedy substituted his version of the facts for those found by the finder of fact, the District Court. For example, although the District Court found substantial noncompliance particularly after 1976, Judge Kennedy argued that "there has been no showing of noncompliance in any degree since that date." Spangler, 611 F.2d at 1243 (footnote omitted noting thirteen instances of noncompliance). Additionally, on the

resegregation issue, Judge Kennedy acted as the trier of fact in finding that "the evidence does not support the conclusion that the school board harbors an intent to establish, or return to, a dual system." Id. at 1244. Irrelevant to Judge Kennedy were the political campaign statements of the newly elected Board members, the actual deliberations of the Board, and the credibility of the Board members as witnesses. Relevant instead to Judge Kennedy was his conclusion that a "policy of favoring [a return to] neighborhood schools is not synonymous with an intent to violate the constitution." Id. at 1245. Moreover, the Board's "resolution is further evidence that the Board is not likely to engage in new acts of intentional discrimination." Id. at 1245-46. Apart from Judge Kennedy's apparent willingness to overlook the facts in the face of a mere promise not to discriminate, compare Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (Kansas a year earlier had repealed the law which had permitted segregation in Topeka), Judge Kennedy's manner of appellate review is totally at odds with settled jurisprudence -- nowhere cited in his opinion -- governing the application of the clearly erroneous standard under Rule 52(a) of the Fed. R. Civ. P. According to that settled jurisprudence: "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); see also United States v. United States

Gypsum Co., 333 U.S. 364, 395 (1948). The reasons for this established principle were recently explained by Justice White for the unanimous Court in Anderson v. Bessemer City, 470 U.S. 564, 574-75 (1985):

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.

As Justice White further explained in Anderson, 470 U.S. at 575:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be

> aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

None of these basic principles, however, appear to have had any effect upon Judge Kennedy in Spangler.

Second, at somewhat of a loss to cite controlling law in support of his legal conclusion pertaining to an absence of intentional discrimination, Judge Kennedy relied on the "incremental segregative effect" theory advanced by Justice Rehnquist in Dayton Board of Education v. Brinkman, 433 U.S. 406, 420 (1977). See Spangler, 611 F.2d at 1242. The problem with this reliance, as is pointed out later in Spangler, 611 F.2d at 1247-48, is that the Supreme Court abandoned this incremental segregative effect theory in Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) ("Dayton II"); and in Columbus Board of Education v. Penick, 443 U.S. 449 (1979).

Finally, and again at a loss to cite controlling law supporting his legal conclusion on the termination of jurisdiction, Judge Kennedy quoted from the Supreme Court's decision in Spangler several years earlier:

> At oral argument the Solicitor General discussed the Government's belief that if, as petitioners have represented, they have complied with the District Court's order during the intervening two years [from 1974 to 1976], they will probably be

entitled to a lifting of the District Court's order in its entirety. Tr. of Oral Arg. 28-31.

Spangler, 611 F.2d at 1243 (brackets by Judge Kennedy), quoting from Pasadena Board of Education v. Spangler, 427 U.S. 424, 441 (1976). The obvious problem with Judge Kennedy's reliance on this quotation is that it was not adopted as law then by the Supreme Court, and it is not now the law. Instead, it was no more than an argument by Solicitor General Robert H. Bork.

The overall importance of Judge Kennedy's views in Spangler on resegregation and on termination of jurisdiction is that these matters had not, and have not yet, been resolved by the Supreme Court, although resegregation has in fact become a reality. See, e.g. Dowell v. Board of Education of Oklahoma City, 795 F.2d 1516 (10th Cir. 1976), cert. denied, 55 U.S.L.W. 3316 (U.S. Nov. 3, 1986); Riddick v. School Board of Norfolk, 784 F.2d 521 (4th Cir. 1976), cert. denied, 55 U.S.L.W. 3316 (U.S. Nov. 3, 1986).

4. AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985) (Kennedy, with Wright and MacBride), rev'g 578 F. Supp. 846 (W.D. Wash. 1983).

This simple and yet complex wage discrimination case presented a cutting-edge issue in employment discrimination law: whether an employer has engaged in illegal gender discrimination in violation of Title VII by setting lower wages for job classifications held predominantly by women. Although the purely legal answer to this question should have been a mainstream "yes," this issue nevertheless was and still is considered on the

cutting edge simply because an affirmative legal answer could open the way to making vast numbers of employers guilty of illegal discrimination. Regardless of this potential effect, the District Court in this case reviewed extensive documentary and testimonial evidence, and ruled that the State of Washington's system of wage compensation constituted illegal employment discrimination under Title VII. Judge Kennedy, in total disregard of the evidentiary record in the case and based instead on a theory not proven in the case, reversed. Further appellate review became moot when Washington agreed to settle the case for nearly one hundred million dollars in wage adjustments, back pay, and front pay.

The union and the individual plaintiffs in this case alleged gender discrimination not on the grounds of some undefined "comparable worth" theory, but instead on the grounds that the State of Washington had determined and imposed a disparate wage scale based upon gender (just as other employers had done based upon race and/or national origin). To establish their claims, the plaintiffs presented evidence -- and proved to the satisfaction of the District Court -- that predominantly male jobs were paid significantly more than predominantly female jobs of equal skill, effort, responsibility, and working conditions; that there was a statistically significant and quite precise inverse correlation between gender and salary (i.e., that the monthly salary decreased by roughly $4.51 for every 1% increase in the female population of the classification); that the State's

own studies which established these disparities and the inverse correlation effectively eliminated nondiscriminatory factors which might account for the wage differentials; and that the wage differentials were part of a system based upon gender-segregated job classifications, gender-segregated advertising, subjective classification decisions, and admitted wage discrimination. Based upon these findings, among others, the District Court held that the State of Washington had violated Title VII both under a disparate impact theory and under a disparate treatment theory.

Judge Kennedy reversed both grounds of liability. In doing so, he committed at least three legal errors.

First, Judge Kennedy held that disparate impact liability could apply only to a single allegedly neutral practice and not to an aggregate of subjective practices. This narrow reading of Title VII disparate impact law was contrary to the precedent then existing in the Ninth Circuit, see, e.g., Peters v. Lieuallen, 746 F.2d 1390 (9th Cir. 1984); Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982); and is contrary to current precedent in the Ninth Circuit, Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc).

Second, Judge Kennedy held that the evidence presented did not establish disparate treatment liability since illicit motive had not been established. In making this determination, however, Judge Kennedy declined to defer to, or even to discuss, the clearly erroneous standard of appellate review (which is discussed at 19-22 supra in the context of his similar reversal

in Spangler), a stringent standard of review applicable not only to underlying findings of fact but also to an ultimate finding of intentional discrimination. Pullman-Standard v. Swint, 456 U.S. 273, 287-89 (1982). Rather than applying the clearly erroneous standard, Judge Kennedy instead simply recharacterized the facts in a manner suitable to him.

Finally, although the State of Washington's own studies rebutted its alleged reliance on prevailing market rates, and although the District Court's opinion nowhere even uses the word "market," Judge Kennedy frequently invoked a free market defense in rebuttal to either disparate impact liability or disparate treatment liability. As to the former, for example, Judge Kennedy held that:

> A compensation system that is responsive to supply and demand and other market forces ... does not constitute a single practice that suffices to support a claim under disparate impact theory.

AFSCME, 770 F.2d at 1406 (ellipsis added). As to disparate treatment liability, Judge Kennedy commented:

> Neither law nor logic deems the free market system a suspect enterprise.

Id. at 1407. Judge Kennedy concluded his opinion with similar market-based sentiments:

> The State of Washington's initial reliance on a free market system in which employees in male-dominated jobs are compensated at a higher rate than employees in

> dissimilar female-dominated jobs is not in and of itself a violation of Title VII.... [T]he law does no permit the federal courts to interfere in the market based system for the compensation of Washington's employees.

Id. at 1408 (ellipsis and brackets added). Judge Kennedy, in other words, set up his own market-based straw man, and then buried him.

In summary, although the Supreme Court opened the door to wage discrimination challenges in Washington v. Gunther, 452 U.S. 161 (1981), Judge Kennedy sought to foreclose such challenges in his AFSCME opinion. His opinion, however, did not end the AFSCME litigation adversely to the plaintiffs. With plaintiffs-appellees' petition for rehearing en banc pending before the Ninth Circuit, the State of Washington agreed to settle the case for $97.2 million in wage adjustments, back pay, and front pay.

APPENDIX B

A SUMMARY AND ANALYSIS OF SEVERAL OF JUDGE KENNEDY'S OPINIONS FAVORABLE TO CIVIL RIGHTS

APPENDIX B

In a number of his judicial opinions affecting the rights of Hispanics, Judge Kennedy has followed settled law or judicial precedent in ruling sometimes for and sometimes against civil rights plaintiffs. Three such opinions, in which he ruled in favor of civil rights litigants, are summarized and analyzed hereafter.

1. Flores v. Pierce, 617 F.2d 1386 (9th Cir. 1980) (Kennedy, joined by Pregerson and Bonsal).

Two Hispanic restaurant owners, whose receipt of a liquor license was delayed, filed this damage action challenging as discriminatory the opposition mounted by various local government officials. Judge Kennedy affirmed the jury findings of intentional discrimination. Although supporters of Judge Kennedy have cited this opinion as illustrative of his sensitivity to civil rights, it would have been virtually impossible and hence outrageous for Judge Kennedy to have overruled the jury findings in this case.

Plaintiffs Barbaro and Alma Flores, owners of a nearby restaurant with a predominately Hispanic clientele, planned to open a restaurant in Calistoga, California, and accordingly applied for a liquor license with the State Department of Alcoholic Beverage Control ("ABC"). Their application was opposed by the Calistoga police chief, the mayor, and members of

the city council. Given the governmental opposition, ABC initially denied the license. Following an appeal, ABC nine months later awarded the license.

Plaintiffs sued the local officials for damages under 42 U.S.C. (1983. At their jury trial, plaintiffs showed, inter alia, that the local officials engaged in racial stereotyping in their opposition papers, that the local officials had not objected to liquor licenses sought by Anglo applicants during the same time period, that the local officials had departed from their ordinary practices in opposing the license, and that the Flores were of good moral character as found by ABC. On this evidence, the jury found that the defendant local officials had intentionally discriminated against the plaintiffs in violation of the Fourteenth Amendment. And the jury awarded $48,500 in compensatory damages to cover for lost profits, for attorneys fees incurred before ABC, and for emotional distress.

On appeal, defendants argued that the jury verdict was wrong. The applicable standard of appellate review, however, all but doomed the appeal. Under the legal standard applicable then, as now, the Ninth Circuit was required to view the evidence in the light most favorable to the prevailing parties and to draw all inferences in the prevailing parties' favor, Fountila v. Carter, 571 F.2d 487, 490 (9th Cir. 1978); and the Ninth Circuit could reverse the jury verdict only if the evidence allowed only a contrary conclusion, Kay v. Cessna Aircraft Co., 548 F.2d 1370, 1372 (9th Cir. 1977).

In his opinion for the Ninth Circuit, Judge Kennedy properly cited the controlling standards of appellate review, and he thus affirmed the jury verdict because the "evidence here was more than sufficient to support a finding that the [defendants] acted with the purpose and intent of discriminating on the basis of race or national origin." Flores, 617 F.2d at 1390 (brackets added).

2. James v. Ball, 613 F.2d 180 (9th Cir. 1979) (Kennedy, joined by Choy, dissent by Hall), rev'd, 451 U.S. 355 (1981).

The issue in this case was whether voting in a special-purpose district could be limited to landowners or instead was subject to the one-person one-vote principle. The District Court held that the voting could be limited to landowners. Judge Kennedy, in a good opinion from a civil rights perspective, applied the one-person one-vote principle and reversed. In turn, Judge Kennedy was reversed by the Supreme Court on a 5-4 vote.

This lawsuit was a Fourteenth Amendment challenge to the constitutionality of several Arizona statutes which limited to landowners voting rights in elections for directors of the Salt River District, with votes essentially apportioned to owned acreage. The lawsuit was brought by persons precluded from the franchise, i.e., renters, and persons who owned less than one acre of land.

At the time this case was brought, the controlling law generally favored application of the one-person one-vote principle initially articulated in Reynolds v. Sims, 377 U.S. 533

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(1964). Not only had the one-person one-vote principle been widely applied, but it had been specifically applied to strike down laws which limited voting to landowners, i.e., Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. Houma, 395 U.S. 701 (1969). In one instance, however, the Supreme Court had allowed voting to be limited to landowners so long as the jurisdiction had a "special limited purpose" which in turn had a significantly disproportionate effect on landowners as a group, Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973).

The Arizona defendants in James argued that Salyer permitted the challenged limitation on voting. Judge Kennedy disagreed. Salyer, he pointed out, involved a water district which consisted entirely of agricultural land farmed by four corporations which bore all the expenses of the district. The Salt River District in James was entirely different. First, as to its water operations, the District encompassed not just agricultural lands but also eight municipalities including major portions of Phoenix. Second, the District was Arizona's second largest electric utility servicing nearly a quarter of a million persons. And finally, the activities of the District did not disproportionately affect landowners. Based on these differences, Judge Kennedy distinguished Salyer, applied the one-person one-vote principle, and held the challenged statutes unconstitutional. He concluded:

> The rationale for departing from the one-person one-vote standard is ... that under certain conditions, of most narrow dimension, there may exist a state created entity, limited to operations with little effect on the general electorate and a substantially disproportionate effect on the interests of a discrete group permitted to vote. If, on the other hand, the operations of a state entity affect a diverse group of citizens, the franchise cannot be restricted to exclude those who have an interest in the election.

James, 613 F.2d at 185 (citations omitted).

In a 5-4 decision which substantially expanded the Salyer exception, the Supreme Court reversed Judge Kennedy and upheld the franchise limitation. Ball v. James, 451 U.S. 355 (1981). Justice White, with Brennan, Marshall, and Blackmun, dissented. Id. at 375-89.

3. National Labor Relations Board v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979) (Wright, joined by Hall, with Kennedy concurring).

The Ninth Circuit in this case held that undocumented workers were "employees" within the meaning of, and hence protected by, the National Labor Relations Act. Judge Kennedy filed a two-sentence concurring opinion. As to the issue on the merits, the Supreme Court in another case subsequently agreed with the Ninth Circuit.

Several undocumented workers filed charges with the NLRB claiming that they had been denied overtime wages. They thereafter were laid off, and they were later denied reinstatement. The NLRB found in favor of the workers, and issued a cease and desist order. The NLRB then sought judicial enforcement of its order.

The employer argued before the Ninth Circuit that undocumented workers were not "employees" within the meaning of § 2(3) of the NLRA, 29 U.S.C. § 152(3). The Ninth Circuit rejected this defense. Judge Wright, in his majority opinion, pointed out that the inclusion of undocumented workers was consistent with the statutory structure of the NLRA, consistent with NLRB interpretations of the law, and consistent with the only other court of appeals' ruling on this issue.

Judge Kennedy filed a nonanalytical and sensitive concurring opinion, Apollo Tire Co., 604 F.2d at 1184, which stated in its entirety:

> I concur. If the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case.

As to the legal issue resolved on the merits, the Supreme Court in another case eventually agreed with the Ninth Circuit. Sure-Tan, Inc. v. National Labor Relations Board, 467 U.S. 883 (1984).

Senator KENNEDY. Mr. Chairman, I regret I wasn't here when Ms. Hernandez was sworn in. I would express a warm word of welcome to her and to our panelists. Antonia Hernandez worked as a staff member of the Judiciary Committee for a long period of time, and during that period of time performed very good service for our committee, just generally, and personally, on the whole range of issues involving equal rights. Those rights are an important issue we face here.

I was just, as someone who has pursued this issue, wondering if you would be kind enough to just tell us what was happening in that community at this time. We heard the allegations. Judge Kennedy heard that whole series of allegations, in terms of where the ballot boxes were located, the harassment of Hispanic Americans in terms of poll watching—the whole range of allegations, and he had indicated that even if they accepted those it wouldn't justify changing the kind of elections that would be held.

What was really happening in that community at that time? Do you firmly believe that if those allegations were reviewed, even submitted to a jury, that there would have been a finding that the elections in that community were sufficiently tainted as to justify or warrant a new election?

Ms. HERNANDEZ. Well, basically, this was in the early seventies, and there was a great deal of effort to try to apply the Voting Rights Act to Hispanics. And we were doing this in Texas and in California. And when I speak of we, I mean MALDEF did.

And there was a great deal of activity within our community trying to activate and educate the Hispanic community to participate in the political process. So that there was a great deal of effort to get the community to really go out and try to participate, knowing that there's a great deal of poverty, lack of education, et cetera.

What is interesting in this particular case is that the facts as they were happening in San Fernando Valley were similar to what was happening in Texas and in other places in the Southwest. Interestingly enough, in Texas, because of the severe overt discrimination of the last 100 years, the courts were finding in our favor.

In California, because you didn't have the lynchings, or at least the overt lynchings and the overt actual segregation and discrimination—in California it is much more subtle—the same facts that we were presenting were being rejected as not being sufficient.

Some of the allegations in this particular case included statements by the Mayor about outside agitators coming in, you know, to change our government, our city government.

Second, we had statements a week before the election by the city clerk alleging fraud and irregularities. Moreover, there was the whole issue of employment discrimination. And also placing of the polling places in predominantly Anglo areas.

The combination of factors is overwhelming. When you have unemployment, poverty, and lack of education, our trying to get minorities and particularly Hispanics to participate in the political process by giving them hope that they will make a difference is extremely difficult. To give you an example, in every case where we have litigated and have won, and gone from an at large to a single member district, there has been a marked difference.

In the Hispanic community, if you show our community that there is hope, that they can make a difference, it happens. And let me give you an example. In San Antonio, as I have already cited, the fact is that in 1976, 37 percent were participating in the polling and voting. By 1985, it had increased to 43 percent. And, in fact, in the last Presidential election, there are statistics that show that Hispanics participated at a higher level than the majority of the population.

Senator KENNEDY. Let me ask you this.

The Judge indicated that the case really asked for a citywide result, that they wanted basically to overturn the whole election system, and I think you make a strong case that if they examined the facts, and they went to a jury, the facts were there that it may very well have been proved. And I think you make a strong case that it would have been proved sufficiently powerful to overturn the whole kind of election system.

Let me go back a step. He'd indicate that he might have been prepared to make some kinds of adjustment in terms of polling places and have partial kinds of response to some of these charges that were made in the petition. But since the plea was for an overall elimination of the at-large election, or vacating of the election, he didn't have that opportunity to be able to make those kinds of findings.

What is your response to that?

Ms. HERNANDEZ. I beg to differ with Judge Kennedy, and let me tell you why. Two reasons.

As you all know, once the case is dismissed, it's res judicata. There have been some statements about the fact that we could have gone back. We couldn't have.

Second, in voting rights cases as in desegregation cases, there are two stages. You first go to the stage of establishing liability, and after you establish liability at a trial, then you go into the second stage, which is the remedy stage.

By dismissing the case on a summary motion, he precluded us from even going to court and establishing liability.

Now, as we all know, once you get to court and establish liability, what one pleads as a remedy might not be what one gets. And it is at the remedy stage, as you know, that the Judges have the discretion to give less than what one would ask for.

So to say he dismissed the entire case because we only wanted the remedy from going to at large to single member districts just doesn't hold.

Furthermore, as I stated, and what makes this case to us extremely important, is that he went out of his way to fill in the blanks where the majority had not done it. And, quite frankly, I must say that with friends like Judge Kennedy, he would have done us a lot more of a favor if he had just concurred and left it at that.

But by setting out all the facts, as he did in this case, what he basically said is if this is all you have, it isn't good enough in the ninth circuit, and you're out.

And so that's the particular significance. And also for us, and I highlight——

Senator KENNEDY. Why do you think he did that?

Ms. HERNANDEZ. Really, I don't know, and I don't understand. And I know that yesterday some comments were made by Judge Kennedy about the fact that he was trying to sort of set out something so that we—and it's MALDEF, because we litigated the case—could come back again. But, as I've already stated the issue was res judicata.

But I think this shows his lack of understanding, and to me that is even more distressing. He comes from California. He has lived among us all of his life. If I was here testifying about someone from the Midwest or even the Northeast, to say that they are not familiar with Hispanics, with the history of our discrimination, I could understand that I have to educate someone. But we're dealing with someone that comes from the Southwest, who has lived among us, and should be much more sensitive to the subtleties of the discrimination and to the subtleties of exclusion when they're in a political process.

And that's where I have the greatest of concern as to what's going to happen. And I have come to you to express that concern. And I guess the question, before you ask me, is what do I want?

Senator KENNEDY. You're a heck of a litigator and educator. [Laughter.]

Ms. HERNANDEZ. And what I want is to go back and to ask Judge Kennedy to give further assurance and clarification as to how he views Hispanics. My concern is that he might not feel that we deserve the same type of protection as the black community and other protected minorities that are protected on civil rights.

I want that assurance. I want to see what he states on the record. I'm also concerned on the issue of women, the *AFSCME* issue. I'm concerned on the *Spangler* issue, I'm concerned with the *TOPIC* issue, and basically the common threat that one sees in those cases is the threat that he kicks people out of court, that he doesn't give them that opportunity. And even when they do win, even when they do satisfy the stringent requirements of a federal district court judge, that he overturns those decisions.

He is a man of intellect, no question about it; a man of devotion, but he's also a man of the establishment and, unfortunately, we have not been part of that establishment.

And what I want is an expansive of consideration of that perception of what America is.

Thank you.

Senator KENNEDY. Thank you very much. Your testimony's very powerful.

The CHAIRMAN. I yield to the Senator from Pennsylvania. The reason we're doing this is because both the witnesses have to catch an airplane and then we'll go to the rest of the panel, if you have any questions for us.

Senator SPECTER. Thank you, Mr. Chairman.

The CHAIRMAN. Ms. Hernandez is her name.

Senator SPECTER. Ms. Hernandez, I came in late on your testimony because I have a conflicting assignment with the Intelligence Committee which is having a session right now, but I wanted to return and ask a few questions.

The subjects which you raised have been discussed at length with Judge Kennedy. In my final round yesterday, I discussed with him

the *Aranda* case and the *Spangler* case and the *AFSCME* case versus *Washington State* in terms of the continuity that, in each case, the Judge either overruled fact findings below, or did not permit the fact finding process to go forward.

In the course of the questioning of Judge Kennedy, he cited assurances of his sensitivity to the underlying fact situations and the people involved. At this juncture, I'm interested to know, by the way that you have testified, why you don't take a position for or against him? Why not?

Ms. HERNANDEZ. In studying his record, and we have studied his record extensively, we know that there have been some other cases which one could construe favorably for minorities. And that has weighed heavily in our situation.

What I want at this juncture is not just an assurance, but for him to verbalize or to state in writing his philosophy, rather than just saying I assure you. I want him to say he believes in certain things, and this is why he believes. Further than that, I would venture to say, as I indicated before, that at this juncture, based on our reading of the record, that if we were to get that and to see the analysis made, justifying his belief, that we would not have the grounds to oppose him.

We do not take opposing a Justice to the Supreme Court very lightly. And in fact, we did not participate or oppose O'Connor, Scalia or Rehnquist.

And so we're not here saying that because he decided one wrong case or one case where MALDEF was involved, that that's sufficient enough. But I don't think that there is enough there. I've listened and I've read very carefully what he said. And there are assurances, but I want those assurances further delineated in writing.

Senator SPECTER. Well, I think that's a very sensitive and understandable position.

When I questioned Judge Kennedy about *Aranda* and the other cases, I put in the record cases which he had decided favorably to the Mexican-American community and other civil rights cases, and we can find that question for Judge Kennedy for the record and we can supply you with a copy of the answer, and you can communicate further with the committee. I'm sure that can be worked out, can't it, Mr. Chairman?

The CHAIRMAN. Yes, we will.

Ms. HERNANDEZ. Let me make one point, Mr. Specter on that point.

On the cases where he has ruled favorably, the *Flores* case and the others, they have been individual cases or dealing with an individual's rights, and there had been a trial and a finding. And it has been—let me put it to you this way. The law has been so well settled that for him to have overturned the cases would have been really unusual. And I am not trying to minimize his participation in those cases.

But they have been individual cases. All of the cases where I raised the concerns, and they have been raised before, deal with constitutional issues covering a group of people, dealing with issues that are much more difficult and where——

Senator SPECTER. More systemic in dealing with.

Ms. HERNANDEZ. More systemic in dealing with the problem. And that is the common thread to both the systemic issues and to the individual issues that he has decided.

Senator SPECTER. Ms. Hernandez, there was one aspect of the case which I would like your comment about.

I had questioned Judge Kennedy on the aspect of the case that summary judgment is to be limited under the law of the ninth circuit to situations where there are clear-cut factual record and were not to be applied where intention or motivation was an issue.

Then I noted in the opinion of the district court there was a reference to denial of discovery, which I found particularly troublesome, where the district court judge said that the plaintiffs had asked for a vast and extensive discovery burden and had not made sufficient assurances that the results would be other than cumulative. And based on my own experience in the federal court, it seemed surprising to me that summary judgment would be issued in a context where discovery was not completed because that discovery could provide a factual basis to warrant additional relief.

Are you personally familiar with specifics of the discovery request and whether it was reasonably calculated to provide the critical facts which might have defeated the summary judgment motion?

Ms. HERNANDEZ. Oh, definitely. In fact, we have gone back to the Archives to get the entire file. And to be fully prepared, I have spoken extensively to the attorney who litigated the case for MALDEF.

And what is interesting in this case is that it is highly unusual, as you know, when parties in federal court ask for discovery, it is denied, and then a summary judgment is granted. In fact, the feeling of our lawyers was that we had such a strong case on appeal because if you have read the findings that the district——

Senator SPECTER. Do you know what the discovery would likely have shown specifically to defeat the motion for summary judgment?

Ms. HERNANDEZ. It would have shown the polarized voting, particularly, throughout the years, which is very important. We were seeking to show, not so much intent but the pattern of employment practices within this city government, the non-responsiveness of the city government to Hispanic concerns, essential elements that go to proving of the pattern of discrimination.

Interestingly enough, if you read the findings of the district court, some of those findings were particularly outrageous, saying that the low voting participation of Hispanics was due to apathy; that if they really wanted to participate in the process, all they had to do was vote.

And so when we took the case up on appeal, we were certain that it was such a strong appeal, that the motion for summary judgment was not going to be upheld.

Senator SPECTER. I have one final question, if I may.

The CHAIRMAN. You can have all the time you want. They both have an airplane at six. It's up to you and them to decide.

Ms. HERNANDEZ. Well, at this point in time, you might as well ask the other questions. It's at Dulles, and there's no way that I'm going to make Dulles.

Senator SPECTER. Yours also at Dulles, sir?

Mr. MARTINEZ. No, that's fine. Whatever time it takes.

Senator SPECTER. Well, I'll ask a short question and you can decide on the length of the answer. [Laughter.]

Is it true that the case was litigated in a context of all or nothing as was asserted here yesterday, that counsel only wanted at large district representation, and would not have settled for more limited equitable relief to cover the polling places or the failure to employ minorities at the various Commissions?

The CHAIRMAN. Ms. Hernandez, you can refer him to the record. You answered that extensively, and I feel like I've snookered the rest of the committee here, the rest of the panel. I had no idea that it was at Dulles or, quite frankly, I would have never let you go first because I think I've done a disservice to the remainder of the panel.

That's in the record, Arlen. She's answered that extensively.

Ms. HERNANDEZ. Thank you.

The CHAIRMAN. Ms. Kiehl, would you stand to be sworn since you were the only one not sworn?

Do you swear that the testimony you will give is the truth, the whole truth, and nothing but the truth so help you God?

Ms. KIEHL. I do.

The CHAIRMAN. Now I apologize to the rest of the committee, and I can assure you, Ms. Hernandez, (a) if I need a lawyer, I'm going to you; (b) if you need a job, please come to me.

Ms. HERNANDEZ. The last time I worked for the Senate, I lost my job when the Democrats lost control of the Senate. I don't think I can deal with that instability any more. [Laughter.]

Thank you.

The CHAIRMAN. Well, I'll try my best to see to it that it's stable, and I won't say any more.

Let me thank you for your testimony. Good luck in making the race for Dulles.

Mr. Martinez, you're welcome to stay, if you'd like, but I understand——

Mr. MARTINEZ. If I can just make a comment, I think I can answer some of the——

The CHAIRMAN. No, you can't make a comment unless you have a plane to catch for real.

Mr. MARTINEZ. Well, I do, but it's at National, not Dulles.

The CHAIRMAN. Go ahead and make your comment then.

Mr. MARTINEZ. Thank you. Thank you.

We had planned on being on the first panel, as you know, but we weren't quite as controversial as people wanted, so we're here to——

The CHAIRMAN. No, that's not the reason you were not on. If you're going to keep that up, I'll see to it you miss your plane at Dulles and move to the next person. Okay?

Mr. MARTINEZ. Mr. Specter, I think the answer to your questions that in the cases that we've discussed, there was an attack on the institution itself, a societally accepted institution, that most of us are brought up to accept as being correct or acting in our interest 99 percent of the time, an educational institution or a governmental institution.

When the attack was upon one of those municipal elections, how the municipality was going to govern itself, or how was an educational institution going to govern itself, or placement of schools, or children attending schools, Judge Kennedy seemed to be much more stringent in his standard.

When there was a ministerial function to be performed that was being attacked, such as in the *Flores* case or in the *Apollo Tire* case, where individuals were just seeking a remedy for themselves, or they wanted a liquor license from the municipality, or they filed complaints with the NLRB, it was much easier for them to find his behalf, sort of taking the little guy's side. There was no direct attack on the institution.

We think he is very qualified and will make a fine Supreme Court Justice.

We also think, though, that we are all products of our background. And we defer many, many times to things that we can see and understand, because we participate in them. And they have been good to us. And they have been good to our families. And we traditionally belong to that club. And we have gone to that school. And we give it deference.

And I think what we have been talking about here today is maybe giving deference, undue deference, to the institutions, without being fully cognizant or appraised of individuals who have not been part of the system, who cannot only do ministerial attacks on the system, but oftentimes need other people to assist them in solving their problems, such as in the *TOPIC* case that was mentioned, when third parties were needed to help them vindicate their rights.

There was no direct relief sought by the individuals discriminated against. In fact, they probably did not even know they were being discriminated against. That is why there was segregation that worked so well.

And in the case of *Pasadena School Board*, where the attack was on the direct authority of the school district, what would it have hurt to have allowed federal jurisdiction to have continued on the school board, over the school board administration?

If they were not doing anything wrong, it would not have impeded them except to file an annual report.

No, I think that the subject that we are talking about here is greater than Judge Kennedy; it is greater than we are dealing with in this room. It is acculturation.

What we are talking about is how we think from the time we are born. But in this case—in this case—it is so much more important.

Because as a law professor, not having availed himself of the different cultures, as Ms. Hernandez pointed out, in our society, especially in California, which by the year 2000 the Census Bureau tells us will be at least 52 percent minority, most of those being Mexican-Americans, it seems incongruent to us that a person could live there that long, espouse a philosophy of equality, and yet have a history where there is little association with the diverse cultures.

And we say not that about Judge Kennedy the judge but about Judge Kennedy the law professor.

So what we ask here today is not that he be unqualified, or that we be against him. I think she eloquently stated the point that we ask merely that he be more cognizant; that he take these things

into account; that he treat people's rights, whether they be against or for a ministerial function denial, the same as—those are treated the same as when they are seeking to vindicate their rights against an institution that he may be feeling comfortable with.

Senator SPECTER. Thank you very much.

Mr. MARTINEZ. Thank you.

The CHAIRMAN. Do you have any reason to believe that this process we are going through now will impact positively on that prospect?

Mr. MARTINEZ. I do. I think questions that you bring out, certainly as I have been hearing today, are of immense assistance to everyone.

One, they are brought out in frank discussion. I think that is a commitment we all have, to frankly discuss this.

Secondly, I think what happens is, it causes people to think. The transition we are going through here today is one from follower to leader.

I do not think anyone has mentioned that. We are going from a judge who is reviewing cases on appeal who says, hey, if I'm wrong, come-back; or someone will tell me I am wrong.

So often in his cases he says, maybe the polling places, there was something wrong with that. Or maybe if the school district has not remedied the segregation, come back.

An impractical solution, from our viewpoint, because it takes money and time when you are dealing with people who are so devastated by that they cannot afford to come back.

But more than that they are saying, someone may correct me. But now—now—he is the one setting the precedent. He is the one who must provide the leadership.

He is the one that will tell us what you intended when you passed a certain law. And it is with the most recent laws that affect civil rights that he has had the most problems: the 1968 Fair Housing Act; the Voting Rights Act; the 42 U.S.C. 1983, the recent interpretations.

Those are the ones he has problems on. Why? Because those are the ones that get to the very heart of our establishments, and whether they act correctly, whether they always provide the equality that we say we stand for.

I think these hearings bring these questions not only into focus, but a man like Mr. Kennedy who I feel I know from reading so many of his opinions now and doing analysis, and discussing him with so many of my colleagues across the country is a man who will take this to heart; is a man who will search his own soul and say, maybe that is something I can do better at.

And we in the Hispanic bar association intend to assist him with that, as we do with all judiciary. What we intend to do is invite him to our national convention in Albuquerque next September so that he can affiliate with over 500 Hispanic attorneys in one place. And we can educate him and he can educate us.

The CHAIRMAN. Mr. Martinez, notwithstanding the fact that you came last, I think it is good that you are toward the end. Because quite frankly I think you may have, in the last 3 days, had the most significant insight into this whole process.

I think what you have just explained and articulated is the most significant thing that has been said in 3 days.

I for one believe you are correct. I have grave doubts about Judge Kennedy; grave doubts. And quite frankly if I was certain that he was going to rule on the Bench in the Supreme Court exactly how he has been for the last 52 years of his life, I do not see how I could vote for him, to tell you the truth; it would be awfully tough.

But I know from my own experience of standing for office, I know that all of us up here, what the educational process is.

Most of us, all of us, are a product of our background and our culture. As a matter of fact, you and I had a discussion. I asked for your help.

I come from an area where I think I am as attuned as any white American can be to the problems of black Americans, because it is where I come from; it is what I am part of.

But I did not grow up in an area or a community where there were large Hispanic, or even small Hispanic, populations. I mean it was just nonexistent.

And exposure and education are important. It wasn't until 3 years ago that I realized the extent to which Hispanic Americans have been simply the victims of prejudice in the most extreme way; as extreme as any black American in this country have been, particularly in the Southwest, but also in other parts of the country.

And how many civil rights leaders there are, and great heroes there have been.

And so this has had an impact on me, and I think I started out way ahead of the game. And I suspect that same process of going through this will have the same impact on Judge Kennedy. At least that is my fervent hope.

And I thank you for waiting. And I still think you have time to catch your plane. You have half an hour, and it only takes about 14 minutes with luck; 18 minutes without luck; half hour if you are in trouble. So you better go.

Mr. MARTINEZ. Thank you very much.

The CHAIRMAN. Thank you very, very much.

Now, the rest of the panel and those who are waiting to testify, I thank you very, very much for your indulgence.

But this is in fact, as you can tell by the questions and the interest, this is really the first real opportunity we have had to speak to the concerns of a group of a significantly large majority in America who we have not had an opportunity to—we have not had much chance to question, nor have representatives of the community spoken beforehand.

Having said that, now let us—I forget now even the order we were going in. Who would be next, based on the way I called it?

Ms. Feinberg, you will be next. Then I guess it was Mr. Wallace we called next. And then, Kristina, you will be next.

And then we will ask questions of all three.

Ms. Feinberg, thank you.

Ms. FEINBERG. Mr. Chairman and members of the committee, my name is Audrey Feinberg. I am a New York City attorney, and I am appearing on behalf of the Nation Institute, a private foundation dedicated to protecting civil liberties and civil rights.

Since 1984, the Supreme Court Watch project of the Institute has studied the records of nominees in order to foster a more informed debate about appointments to the high court.

Based on our study, Judge Kennedy's record fails to demonstrate a powerful commitment to key constitutional freedoms.

The Nation Institute believes that there should be no presumption of confirmation for any person named to the Supreme Court. A nominee should have to demonstrate that he or she is qualified for the job. In particular, there should be no presumption now, not only because of the vague record of this nominee, but also because of the unmistakable motivation behind this President's pattern of nominations, and because of the fact that the Justice who replaces Lewis Powell will change the direction of the court.

We have studied Judge Kennedy's record in eight areas including criminal law, privacy, freedom of expression and discrimination in employment, education, housing and voting.

It is on issues such as these that a just and free society measures itself. In the law they are our collective conscience. How a judge embraces these core values says much about their view of the Constitution. Is it a robust, full bodied interpretation, in the grand tradition of the Court's finest Justices? Or is it a more rigid view, tolerating not even the moderate, balanced approach of Justice Powell?

Will Judge Kennedy be the conscience of this court?

Based on our study, Judge Kennedy's record is undistinguished at best. I will mention a few of his more troubling opinions.

In one 1982 case, Judge Kennedy joined a dissent suggesting that an airline may impose strict weight requirements on female flight attendants, based on passengers' perceived preferences for slender women. Does Judge Kennedy still believe this today? If the case actually had gone his way, it would mean that customers' gender biases would trump equal protection of the laws. Fortunately, the majority of Judge Kennedy's court rejected his strained view. The case I refer to is *Gerdom* v. *Continental Airlines.*

In the area of freedom of speech, Judge Kennedy joined an opinion, since vacated by the Supreme Court, upholding the firing of a homosexual from his federal job. The employee had been active in the Seattle Gay Alliance, displayed homosexual advertisements in his automobile window, and publicly indicated his homosexuality. Judge Kennedy failed to recognize the employee's first amendment rights. This case is *Singer* v. *U.S. Civil Service Commission.*

Members of this committee tried to elicit statements from the nominee that he was sensitive to constitutional values. Many times, however, his answers were simply unresponsive.

For example, Mr. Chairman, I heard you ask whether it would be constitutional for Congress to require affirmative action as a remedy for intentional employment discrimination. While Judge Kennedy indicated support for voluntary programs, he refused to answer your question. Does he truly doubt Congress' authority to fashion remedies to expunge discrimination from the work place?

After listening to what this nominee has said, or more importantly, what he did not say, we are still uncertain whether he would forcefully protect constitutional values.

For this reason, we believe that the Senate needs to probe more deeply into Judge Kennedy's views.

A year and a half ago I testified before this committee at the confirmation hearings of Judge Antonin Scalia. At that time, the Senate approved the nominee, despite his refusal to answer many questions.

This past fall the committee did itself proud by a rigorous examination of Justice Robert Bork. Judge Kennedy should similarly be made to explain. Better to know what he is about before his ascension to the High Court than after.

Until such time as his views are smoked out, and the questions raised by his record are laid to rest, we cannot endorse Judge Kennedy's nomination.

Thank you.

[The statement of Ms. Feinberg follows:]

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TESTIMONY OF

AUDREY FEINBERG,

ON BEHALF OF THE NATION INSTITUTE

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

ON THE NOMINATION OF ANTHONY KENNEDY

FOR ASSOCIATE JUSTICE OF THE SUPREME COURT

December 1987

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am Audrey Feinberg, an attorney practicing in New York City, and I am testifying here as a consultant to the Supreme Court Watch project of The Nation Institute. Since 1984, Supreme Court Watch has monitored the record of potential and actual nominees to the Supreme Court, providing information to the press, public interest groups, and the Senate to foster a more informed debate concerning Supreme Court appointments. The Nation Institute is a non-profit private foundation that sponsors research, conferences and other projects on civil rights, civil liberties, and public policy issues.

Together with a team of attorneys, I have studied Judge Kennedy's views for the Nation Institute. We have read and analyzed his judicial opinions as well as his important public statements in eight areas: (1) employment discrimination; (2) discrimination in education, housing, voting rights and criminal law; (3) the right to privacy; (4) criminal procedure; (5) capital punishment; (6) freedom of speech, freedom of the press, and the Freedom of Information Act; (7) freedom of religion; and (8) prisoners' rights.

The results of this study have been released in the attached Nation Institute report. I ask that this report be included in the record as the Nation Institute's written

testimony. The Introduction to the Report summarizes its conclusions, and lists several questions concerning Judge Kennedy's record.

The Nation Institute urges the Committee to examine the Introduction, as well as the entire report and to investigate the questions raised within it before voting on the confirmation of Judge Kennedy. The choice of the person to fill the vacancy on the Supreme Court is no less important now than it was when Judge Bork was nominated. If confirmed, Judge Kennedy is likely to serve on the Supreme Court well into the 21st century. With this in mind, the Senate has a responsibility to continue to exercise its advice and consent powers, and to ensure that it has carefully evaluated his record.

The CHAIRMAN. Thank you. Mr. Wallace.

Mr. WALLACE. Thank you, Mr. Chairman.

The National Association of Criminal Defense Lawyers has conducted a thorough review of all of Judge Kennedy's opinions in criminal cases, some 120 in number.

We have surveyed all of our members who practice in the ninth circuit for input on his professional qualifications.

The result is a 50-page report which was furnished to the committee last week, and which is summarized in my written statement.

Since our report takes a position of no opposition to Judge Kennedy's nomination, we would not ordinarily feel a need to testify. The report should speak for itself.

But this committee will be hearing later from a panel of eight law enforcement witnesses characterizing Judge Kennedy's record on criminal law issues from a law enforcement perspective.

Our concern is that this would leave the committee with only half the picture. Under this Nation's adversarial system of criminal justice, the search for truth—that is, the pursuit of the whole picture—requires an equal opportunity for responsible input from both sides.

We believe this is just as true in the halls of Congress as it is in the courtroom. We feel it would be irresponsible of us not to speak up now to share our perspective with the committee to ensure the fullest possible record for the Senate's deliberations.

This is not to say that we come out 180 degrees opposite from the law enforcement community. The main difference is probably that we have analyzed his record from a very critical point of view rather than from a friendly one.

But our final conclusions are probably similar. We have a high respect for Judge Kennedy, for his grasp of criminal issues, his instinct for fairness, and his integrity and professionalism.

We see him as a mainstream conservative. He approaches cases with a general presumption that the Government is correct, but appears to entertain all arguments fairly and with an open mind.

He respects precedent, and is careful to make his opinions no broader than they need to be to address the case before him.

We do, however, have some serious concerns. We do not accept his pragmatic theory of both the exclusionary theory and the *Miranda* decision.

The exclusionary rule is not a mere tool for deterring police misconduct. The Supreme Court, in creating the rule in 1961, said that the rule is an essential part of both the fourth and the 14th amendments.

And this is not just a matter of the Warren Court pushing the law, as Judge Kennedy said yesterday, to its verge. Way back in 1914, in the *Weeks* case, the Supreme Court held, nine to nothing, that if evidence seized in violation of the fourth amendment can be used against an accused, quote, his right to be secure against unreasonable searches and seizures is of no value, and might as well be stricken from the Constitution, end quote.

We are impressed that Judge Kennedy respects this right, and the exclusionary rule itself. But we would hope that he could grow to be less concerned with the rule's pragmatic function, upon

which he premises his support for the good faith exception, and more sensitive to its constitutional essence, the absolute right of individuals to be free from unreasonable searches and seizures.

Nothing in the fourth amendment, or in any constitutional provision, either expressly or in spirit, purports to allow violations of the Constitution if only they are done with good intentions.

On the *Miranda* warnings, which are fundamentally grounded in the fifth and sixth amendments, we would add our hope that before Judge Kennedy goes about finding them unworkable, and tinkering with them, he would bear in mind their function of giving substance to constitutional protections for society's underclasses.

Attorney General Meese and Ivan Boesky do not need the warnings when they come under criminal investigation. They already know their rights.

But the warnings are absolutely irreplaceable for the uneducated and unsophisticated individuals suspected of crime.

We are also concerned about Judge Kennedy's occasional willingness to discount as harmless error some serious procedural lapses by the government against unsympathetic defendants. I refer the committee to the governmental misconduct cases discussed in our report.

We are also concerned about a possible insensitivity to the sixth amendment right to counsel, in the *Gouveia* case, cited in our report, where he took the position that an individual's constitutional right to counsel does not exist until indictment, even where a prisoner was already being punished for a crime he had not yet been convicted of, or even charged with.

Finally, we share the concerns about his record on sex discrimination that were voiced earlier this afternoon, because of what it may say about his overall sensitivity to individual rights.

In the final analysis, however, these are matters of disagreement, not disqualification.

The National Association of Criminal Defense Lawyers has only opposed one federal judicial nominee in its entire 29 history: Robert Bork. And our concerns about Judge Kennedy's sensitivity to individual rights, his openmindedness, or the possibility of him having an ideological agenda, are infinitesimal compared to those surrounding the Bork nomination.

Thank you.

[The statement of Henry Scott Wallace follows:]

STATEMENT OF

HENRY SCOTT WALLACE

LEGISLATIVE DIRECTOR

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

REGARDING

THE NOMINATION OF JUDGE ANTHONY KENNEDY

TO BE ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

DECEMBER 17, 1987

Mr. Chairman and distinguished members of the Committee, I am honored to testify today on behalf of the National Association of Criminal Defense Lawyers regarding the nomination of Ninth Circuit Judge Anthony Kennedy to be an Associate Justice of the U.S. Supreme Court.

NACDL is the only national bar association devoted solely to maintaining a fair balance between the power of the state and the rights of individuals in criminal cases, and to the independence and expertise of the criminal defense bar.

Immediately after President Reagan announced his intention to nominate Judge Kennedy, we canvassed our members who practice in the Ninth Circuit, for information about the nominee and his qualifications. At the same time, a committee of NACDL experts in major substantive areas of criminal law began an in-depth review of some 120 opinions Judge Kennedy has written or joined

in involving criminal justice issues. I am here today to present our findings to the Committee.

SUMMARY

In the area of criminal law, Judge Kennedy may be characterized as a moderate conservative. He approaches cases with a general presumption that the government is correct, but appears to entertain all arguments fairly and with an open mind.

Perhaps the most striking difference between him and the Administration's first nominee for this vacancy, Judge Robert Bork, is the apparent lack of any broad ideological bias or agenda. Although he has displayed an occasional eagerness to discount as "harmless error" some serious procedural lapses by the government against unsympathetic defendants, he appears generally able to treat procedural issues on their own merits, to analyze and decide them separately from issues of guilt or innocence, with appreciation for their importance in assuring a fair trial and safeguarding vital individual rights. During his tenure on the Ninth Circuit, he has reversed 30 percent of the criminal convictions he has reviewed, compared with a national average of 12 percent.

The strongest common thread among Judge Kennedy's opinions and among comments from attorneys who have argued before him is that he seeks the narrowest possible resolution of the issues, confining his rulings to the facts of the case and relying heavily upon precedent. He is, in other words, a sincere and credible proponent of "judicial restraint," in stark contrast to

the unrestrained, politically driven activism of Judge Bork. The caution and restraint with which he crafts his rulings may account for the fact that, in 90 percent of his opinions, there is no dissent, a higher rate of unanimity than for most of his colleagues.

His opinions display a commendable breadth of understanding of some fairly sophisticated criminal law issues. They are generally thorough, well-researched, and accurate and fair in their descriptions of controlling law and precedent.

On a personal level, criminal defense attorneys--both those who have argued before him in the Ninth Circuit and those who have studied under him at the McGeorge School of Law--give him very high marks for honesty, integrity, professionalism, cordiality, and fairness.

Viewed in the context of Justice Powell's record on criminal law issues, there is no clear indication that Judge Kennedy will shift the "balance" of the Court, either to the right or to the left. Areas of similarity include a general "tough but fair" approach to criminal cases, as well as substantive positions on major issues such as the death penalty and the exclusionary rule.

SPECIFIC AREAS

Fourth Amendment: There has been much attention given to Judge Kennedy's views on the issue of a "good faith" exception to the exclusionary rule. I must point out that, contrary to common public perception, Judge Kennedy did not create, or even endorse, the good faith exception in his dissent in U.S. v. Leon, no. 82-

1093 (January 19, 1983) (per curiam, unpublished).

In that case, the government did indeed ask the Ninth Circuit to recognize an exception to the exclusionary rule where the police relied in good faith upon a warrant later determined to be invalid. The court declined this invitation, and Judge Kennedy wrote a very brief dissent--where he did not find it necessary to discuss any notion of an exception to the exclusionary rule, because he found the search warrant valid. Explaining his disagreement with the majority on the question of whether the warrant was supported by adequate probable cause, he indicated that he would have given more weight than did the majority to the conclusion of experienced narcotics officers that certain patterns of behavior which might be viewed as innocuous were in fact drug related, stating that "whatever the merits of the exclusionary rule, its rigidities become unacceptably compounded when the courts presume innocent conduct when the only common sense explanation for it is on-going criminal activity." In reversing the Ninth Circuit (468 U.S. 897), the Supreme Court adopted the government's position, not Judge Kennedy's.

He did, however, address the good faith issue in another case. In U.S. v. Harvey, he suggested that, since the purpose of the exclusionary rule is to deter improper police conduct, the "rule is torn from its pragmatic mooring [if it is invoked where the police officer] acted not only in good faith but also with probable cause under exigent circumstances." 711 F.2d 144 (1983) (Kennedy dissenting from a denial of a rehearing en banc). He

has reiterated this "pragmatic" view of the exclusionary rule in his testimony at these hearings on Monday, adding, at the same time, that the current system "works much better than most people give it credit for."

Overall, he has supported suppression in 7 of 26 opinions where the issue was squarely reached, including a few particularly vigorous opinions in cases where he perceived an extreme police violation of the security and privacy interests protected by the Fourth Amendment.

Most notable is his dissent in U.S. v. Penn, 647 F.2d 876 (1980), where he said it was "pernicious" and "dangerous as precedent" for the police to have offered the defendant's 5-year-old son $5 to tell them where in the back yard his mother buried some heroin, stating that "indifference to personal liberty is but the precursor ot the state's hostility to it."

In another case, he ordered the suppression of heroin discovered through a warrantless rectal search, even though there was more than adequate probable cause to believe that the defendant was carrying heroin in his rectum as he came across the U.S. border. Kennedy criticized the search as unnecessarily intrusive, and expressed a desire to protect the privacy rights of innocent persons against such searches. U.S. v. Cameron, 538 F. 2d 254 (1976).

Generally, he appears to appreciate the value of the exclusionary rule in enforcing the Fourth Amendment--as long as it remains "workable"--and to support the Leon good faith exception (like Justice Powell). He may, however, be amenable to

some further trimming of the areas where the exclusionary rule is applicable.

Governmental misconduct: In general, where questions of prosecutorial or police misconduct are raised, Judge Kennedy tends to come down on the government's side in all but the most egregious cases.

For example, in one bank robbery case, Judge Kennedy held that the government's use of an informer to supply the getaway car, to supply money for the disguises, and buy drinks at meetings with the defendants did not rise to the level of entrapment. U.S. v. Dearmore, 672 F.2d 738 (1982).

And in a case charging defendants with possession of dynamite, he wrote that it was harmless error for the government to destroy the dynamite because there was no safe place to store it, as long there was some reliable secondary evidence to prove that the material destroyed actually was dynamite. U.S. v. Loud Hawk, 628 F.2d 1139 (1979) (Kennedy concurring). Despite the serious risks of abuse by government agents seeking to cover up bungled handling of evidence, Judge Kennedy expressed confidence that the courts would be able to weed out the occasional case of government bad faith.

On the other hand, he wrote a strong opinion condemning police excesses in McKenzie v. Lamb, 738 F.2d 1005 (1984). In that case, police officers recruited entertainer Wayne Newton to help them catch two men suspected of selling stolen turquoise jewelry. Even though the set-up failed to confirm their

suspicions, the undercover officers staged a dramatic, brutal arrest, during which they were asked for identification, and one officer respond by pressing the barrel of his gun between the suspect's eyes and saying, "that's about all [the identification] you need." The men turned out to be completely innocent. Judge Kennedy approved their civil rights action against the police, calling the police conduct "outrageous and unjustifiable."

And in a drug case, he joined in a dissent by Judge Hufstedler lashing out at the government's payment of a $350 "reward" for a "successful investigation" by an informant, a Mexican day laborer whose annual income was $400, citing "the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well." U.S. v. Hart, 546 F.2d 798 (1976).

Death penalty: As Judge Kennedy noted on Monday, he has never committed himself on the constitutionality of the death penalty. He has, however, written four opinions in death penalty cases, coming down on the defendant's side in two of them, on solid procedural grounds, evidencing a tendency to err on the side of granting relief in close cases.

Even assuming that his silence on the death penalty itself may be taken as approval of it, he would be no different from Justice Powell, who dissented from the Supreme Court's 1972 anti-death penalty ruling in Furman v. Georgia, 408 U.S. 238, and who sided with the Court majority in approving the new post-Furman crop of death penalty statutes in 1976.

Right to counsel: Judge Kennedy's record here is mixed. In one case involving an IRS summons to an attorney for fee information to be used against the attorney's client, he proved himself sensitive to important right-to-counsel issues by endorsing the theory that fee information should be protected by the attorney-client privilege where disclosure would implicate the client in the very criminal activity for which the advice was sought--a theory criticized by some conservative courts and commentators. U.S. v. Hodge and Zweig, 548 F.2d 1347 (1977).

But joining in a dissent in a prisoner rights case, he endorsed the position that the Sixth Amendment right to counsel should never attach before indictment, even where the prisoner was being punished beyond the administratively-allowable maximum for a new crime he was suspected of committing while in prison. U.S. v. Gouveia, 704 F.2d 1116 (1983). The dissent said the denial of counsel would cause no harm because "suspects are amply protected by the 'ethical responsibility' of the prosecutor and due process standards."

This notion is fundamentally at odds with the Sixth Amendment right to counsel and the functioning of the adversary system of criminal justice. It is ludicrous to suggest that a suspect, completely and indefinitely cut off from counsel, family, friends, and even other prisoners, can expect to have his rights "amply" represented by his sworn adversary. If the Framers had expected that the prosecutor could fairly serve as the guardian of the rights of the accused, they would have seen no need for the Sixth Amendment.

However, Judge Kennedy's joinder in this opinion may, viewed charitably, be attributable to judicial restraint on a novel legal question. In addition, the offending language, although showing an extraordinary lack of sensitivity to the right to counsel, was mere obiter dictum, not directly authored by him.

Confrontation clause: Of all the constitutional rights affecting criminal cases, this is the one that Judge Kennedy has been the most sensitive to, particularly where the trial judge has restricted the defendant's right of cross-examination.

However, in a very recent case, he ruled that the trial judge had properly disallowed certain cross-examination, because the defendant had already had an opportunity for "substantial" other cross-examination. Bright v. Shimoda, 819 F.2d 227 (1987). The dissenting judge vigorously criticized this attitude that the defendant had suffered no harm because he had already received "most" of the cross-examination he was entitled to, accusing Kennedy of "sacrificing individuals' rights in the name of judicial efficiency, or, to put it less politely, judicial expediency."

Miranda warnings: In the cases Judge Kennedy has decided involving Miranda warnings, he has taken a balanced approach, and has expressed no obvious hostility to the requirement for the warnings, indicating acceptance of them in one case by stating that they have become "central for law enforcement in every jurisdiction." U.S. v. Scharf, 608 F.2d 323 (1979). At these

hearings, however, he has said that the Miranda warnings are, like the exclusionary rule, "pragmatic" rules, which "if they are not working, should be changed."

State-of-mind standards: Judge Kennedy has shown himself to be a stickler for accurate jury instructions as to the level of intent required by statute. Twice he has reversed convictions where "willful blindness" instructions were given to the jury under statutes containing the stricter "knowingly" standard. U.S. v. Jewell, 532 F.2d 697 (1976); U.S. v. Pacific Hide and Fur, 768 F.2d 1096 (1985). One reassuring aspect of these two cases is that his rulings were not affected by any "white collar/blue collar" distinctions--i.e., by the fact that the defendant in one case was a drug dealer (Jewell), and in the other, a landfill operator charged under the Toxic Substances Control Act (Pacific Hide).

He condemned other, similarly flawed intent instructions, and reversed convictions, in U.S. v. Jones, 681 F.2d 610 (1982), and U.S. v. Erskine, 588 F.2d 721 (1978).

NACDL'S POSITION

In terms of experience, temperament and integrity, Judge Kennedy appears to be well qualified.

In terms the substance of his judicial rulings on criminal issues during his twelve years of service on the U.S. Court of Appeals for the Ninth Circuit, his views overall--although unabashedly conservative--appear to be well within the

"mainstream" of American jurisprudential thought.

Because of serious substantive misgivings, however, NACDL is unable to lend its affirmative support to the nomination. In the Fourth Amendment area, for example, NACDL has long condemned the notion of a good faith exception to the exclusionary rule. The Constitution unequivocally protects the right of the people to be free from unreasonable searches and seizures, and requires warrants supported by probable cause; it suggests nothing about exceptions for well-intentioned constitutional violations by judicial or law enforcement officers. NACDL believes that the courts should be less concerned with the exclusionary rule's "pragmatic moorings," and more concerned with its constitutional essence.

We similarly challenge his "pragmatic" approach to the Miranda ruling. To our urgent plea that its constitutional compulsion not be forgotten, we would add a note that the Miranda warnings are of greatest value to society's underclasses. When an Edwin Meese or an Ivan Boesky comes under investigation, he does not benefit from the warnings; he already knows his rights. The true value of the warnings is to give substance to constitutional protections for the uneducated and unsophisticated individual, and no other device can do this so well.

Another fundamental concern of NACDL's is Judge Kennedy's apparent presumption that law enforcement officers as a class are generally more wise, more credible, and more trustworthy than anyone else, particularly persons accused of crime. This mindset is reflected in opinions such as Leon, Gouveia, various

prosecutorial misconduct decisions, and Darbin v. Nourse, 664 F.2d 1109 (1981)--where he said he would be "gratified" rather than "shocked" to hear a prospective juror announce that law enforcement officers are generally more trustworthy and honest than prisoners. We do not think it appropriate for a judge to find bias so gratifying; it is the job of the judge, the magistrate, and the jury to maintain scrupulous impartiality, to cut through all preconceptions and stereotypes, to consider only the evidence formally presented.

Moreover, NACDL is deeply concerned about the possibility of a broader insensitivity to individual rights, as suggested by Judge Kennedy's approach to issues of gender discrimination. This problem is evidenced both in his opinions--such as AFSCME v. Washington, 770 F.2d 1401 (1987) (rejecting comparative worth approach to sex discrimination in employment cases under Title VII), and U.S. v. Gerdom v. Continental Airlines, 692 F.2d 602 (1982) (allowing "weight discrimination" against female airline flight attendants)--and in his long history of membership in private clubs which discriminate against women and minorities.

Nevertheless, in its entire 28-year history, NACDL has opposed only one federal court nomination--that of Robert Bork--and the doubts about Judge Kennedy's commitment to individual liberties are infinitessimal compared to those surrounding the Bork nomination.

For all these reasons, NACDL cannot support, but does not oppose, the nomination of Judge Kennedy to the Supreme Court.

The CHAIRMAN. Thank you. Ms. Kiehl.

Ms. KIEHL. Thank you. My name is Kristina Kiehl. And despite my appearance on this panel, I am not a lawyer.

I represent Voters for Choice.

The hearings on the nomination of Robert Bork were a referendum in part on the right to privacy. They generated an unprecedented national discussion of the constitutional boundaries between government power and the private domain of the individual.

In refusing to confirm the nomination of Robert Bork, the Senate was confirming the sense of the American people that freedom from government intrusion in private reproductive decisions is a fundamental human right.

Since the 1973 Supreme Court decision on abortion in *Roe* v. *Wade*, the public is committed to keeping abortion safe and legal. According to polling data analysis, in 1975, 75 percent of the American public supported legal abortion.

More than 10 years later, the percentages are virtually identical, with 76 percent favoring legal abortion.

This is an informed judgment. A majority, 55 percent, know someone who has had an abortion. And 82 percent of Americans say they are not likely to change their minds on this issue.

Thus, there is an important counterpoint to the legal discussion of the right to privacy, and that is the unwavering determination of a majority of Americans that deciding whether or not to bear a child is a private decision.

Let Judge Kennedy be reminded that it is not only a matter of law, but a matter of deeply held personal belief that in certain private decisions government has no place.

If confirmed, Judge Kennedy will be accountable to the Constitution and to the laws. And this hearing will be the last time in his judicial career that Judge Kennedy will be accountable directly to the people and to their elected representatives.

We hope these confirmation hearings will leave Judge Kennedy with a sensitivity to people's lives, an understanding that the right to a private choice about abortion is not a right, if some women can make that decision only with government permission.

In the end, liberty is not in the Constitution, it is not in the laws. Liberty is in the lives of the people, or it is nowhere.

The Court must look not only to the letter of the Constitution, and not only to the letter of the law. The Court must look to the lives of the people to see where liberty is alive.

Judge Kennedy must look at the lives of women. Today, most women can choose whether or not to bear a child, and can make that choice without government interference. We call that the right of privacy.

But women dependent on medicaid, women in prison, women in the Peace Corps, and native American women cannot make that choice. A conscious government policy makes that choice impossible for them. You will look in vein for the right of privacy in their lives.

The Constitution and the courts have said women have the right to decide, without government compulsion, whether to bear a child, but if that woman is dependent on medicaid the Government is not neutral. The Government has thrown its decisive financial clout on

one side of her so-called privacy decision. Look at her life and you will not see the right to privacy, for the Constitution and the courts have failed her.

Before *Roe* v. *Wade* there were two classes of women: those with the money and the know-how to buy a safe, legal abortion, and those who had to risk potentially deadly back-alley abortions, or bring an unwanted child into this world.

Today, medicaid policy divides American women into two classes: those who can afford an abortion and those who cannot. Where is the right of privacy when that right can only be bought for a price?

We believe that Judge Kennedy does not intend to overturn *Roe* v. *Wade,* but if we allow that right to be nibbled away at the edges, then we will have created many classes of women who, in actuality, have different rights depending on where they live, who they know, and how much money they have.

That is the situation we had before *Roe* v. *Wade,* when abortions were available to women in some States, and to all women who had the money to travel to a place where safe and legal abortions could be obtained.

We are heartened to hear Judge Kennedy affirm the constitutional principle of privacy. We cannot oppose Judge Kennedy because we believe that he is committed to upholding a Constitution that Judge Bork was determined to rewrite.

But we cannot endorse him because we are not confident he is willing to look beyond the theory of the law to assure that liberty, and the right of privacy exists in the lives of all American women.

For my daughters' sakes, I hope Judge Kennedy will prove his conviction that liberty must be protected, not just in the law, but in our lives. Thank you.

[The statement of Kristina Kiehl follows:]

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TESTIMONY OF

KRISTINA KIEHL

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In refusing to confirm the nomination of Robert Bork, the Senate was confirming the sense of the American people that freedom from government intrusion in private reproductive decisions is a fundamental human right.

Since the 1973 Supreme Court decision on abortion in Roe v. Wade, the public has remained committed to keeping abortion safe and legal. According to polling data analysis, in 1975, 75% of the American public supported legal abortion. More than 10 years later, the percentages are virtually identical with 76% favoring legal abortion. This is an informed judgement -- a majority, 55%, knows someone who has had an abortion and 82% of Americans say they are not likely to change their minds on this issue.

Thus, there is an important counterpoint to the legal discussion of the right to privacy . . . and that

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is the unwavering determination of a majority of Americans that deciding whether or not to bear a child is a private decision.

Let Judge Kennedy be reminded that it is not only a matter of law but a matter of deeply held personal belief that in certain private decisions, government has no place.

If confirmed, Judge Kennedy will be accountable to the Constitution and to the laws. And this hearing will be the last time in his judicial career that Judge Kennedy will be accountable directly to the people and to their elected representatives.

We hope these confirmation hearings will leave Judge Kennedy with a sensitivity to peoples' lives -- an understanding that the right to a private choice about abortion is not a right if some women can make that decision only with government permission.

In the end, liberty is not in the Constitution. It is not in the laws. Liberty is in the lives of the people, or it is nowhere.

The Court must look not only to the letter of the Constitution, and not only to the letter of the law, the Court must look to the lives of the people to see where liberty is alive.

Judge Kennedy must look at the lives of women. Today most women can choose whether or not to bear a child, and can make that choice without government

interference. We call that the right of privacy, but women dependent on Medicaid, women in prison, women in the Peace Corps, and Native American women cannot make that choice. A conscious government policy makes that choice impossible for them. You will look in vain for the right of privacy in their lives.

The Constitution and the Courts have said women have the right to decide, without government compulsion, whether to bear a child. But if that woman is dependent on Medicaid, the government is not neutral. The government has thrown its decisive financial clout on one side of her so-called privacy decision. Look at her life and you will not see the right to privacy. For her the Constitution and the courts have failed.

Before Roe v. Wade, there were two classes of women: those with the money and know-how to buy a safe, legal abortion, and those who had to risk a potentially deadly back-alley abortion or bring an unwanted child into the world.

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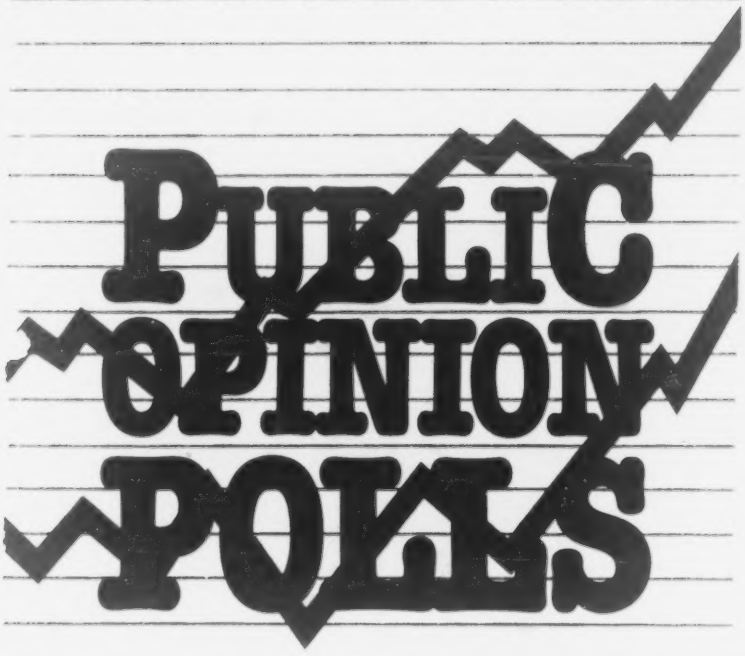
For my daughters' sakes I hope Judge Kennedy will prove his conviction that liberty must be protected not just in the law but in our lives.



Reproductive Rights

An Analysis

INTRODUCTION

Since the 1973 Supreme Court decision on abortion in *Roe v. Wade*, the public has remained committed to keeping abortion safe and legal. In 1975, 75% of the American public supported legal abortion. More than ten years later, the percentages are virtually identical, with 76% favoring legal abortions (21% always; 55% under certain circumstances). The following report provides an overview and analysis of recent major opinion polls on abortion and other reproductive health issues.

This report is based on a comprehensive compilation (full copies available upon request) of opinion data on abortion and birth control from the following polls: Gallup, Harris, National Opinion Research Center, ABC/*Washington Post*, CBS/*New York Times*, and NBC News. Representative questions and results were chosen for this report.

The polling data indicate:

- A majority of Americans know someone who has had an abortion (55%) and believe that abortion will remain legal (74%).
- The public understands that undesirable results could occur if abortion were made illegal. People think the following would happen: Many women would break the law and get illegal abortions (88%); many women would be physically harmed by illegal abortions (87%); welfare costs would rise to pay for unwanted poor children (70%).
- Americans are vehemently opposed to terrorist acts against women's health care centers. Seventy-seven percent believe that such attacks amount to campaigns of terrorism.
- Americans want to see sex education included in high school instructional programs (75%) and favor links between public schools and family planning clinics so that teenagers can learn about contraceptives and obtain them (67%).

INFORMATION AND SALIENCE

The American public consistently has proved its support for safe and legal abortion. This is an informed judgment, and 82% of Americans say they are not likely to change their minds on this issue. People recognize the need for family planning: they use birth control (70%), and they know people like them who have had abortions (55%). Thus, despite the graphic and extreme terms that have been used to challenge access to reproductive health care, Americans are clearly committed to preserving a full range of reproductive options.

Q: "How much information do you have about the abortion issue? Do you have all the information you need, most of the information, some information, or very little information?"

	All	Most	Some	Very Little	DK/NA
1984	21%	30%	31%	17%	1%
1982	24	21	31	22	2

Q: "How firm are you about your opinion on abortion—would you say you are very likely to change your opinion, somewhat likely to change, somewhat unlikely to change or very unlikely to change?"

	Very likely	Somewhat likely	Somewhat unlikely	Very unlikely	DK
1984	3%	13%	23%	59%	2%
1982	2	12	21	61	4

Source: General Social Surveys, 1972-1984: Cumulative Code Book. National Opinion Research Center, University of Chicago, July 1984.

Q: "We'd like to get your own personal opinion on a number of issues. First, are you in favor of or opposed to the use of artificial methods of birth control?"

	Favor	Opposed	Don't Care (Vol)	No Opinion
1985 (November)	70%	21%	–	9%
1979 (October)	73	17	7	3

Source: CBS News/New York Times Survey, (November 25, 1985). Roper, (October 1979).

Q: "Do you know anyone who has had an abortion?"

	Yes	Yes, more than one (Vol)	No	DK
1985 (January)	52%	3%	45%	1
1981 (May)	53	1	47	–

Source: ABC News/Washington Post Survey #182 (January 1985).

INFORMATION AND SALIENCE

continued

Q: "Do you know anyone who has had an abortion?"
"Is that person close to you, or not?"
(September 1985)

	Know Someone	Someone Close
TOTAL	42%	28%
Men	39	24
Women	46	32
18–24	55	39
25–29	55	46
30–49	49	30
50–64	32	18
65 and over	20	10
Have children 6–18	42	32
No children 6–18	40	26
Less than high school	23	17
High school grad	42	27
Some college	57	39
College grad	57	34
Married or have been married	40	25
Never married	52	37
White	44	28
Black	29	26
Hispanic	48	29
Protestant	41	26
Catholic	39	25
White Fundamentalist Christian	38	22
Republican	48	29
Democrat	35	23
Independent	47	32

Source: "Public Attitudes About Sex Education, Family Planning and Abortion in the United States," conducted for Planned Parenthood Federation of America by Louis Harris & Associates (August–September 1985); Study No. 854005, Table 27, p. 68.

TRENDS OVER TIME

Public sentiment on abortion is essentially pro-choice. The vast majority of Americans (88%) believe that abortion should be legal (54% always; 34% sometimes), and the degree of pro-choice sentiment depends on the circumstances. Very strong pro-choice advocates constitute between 21 and 54% of the electorate, while people totally opposed to legalized abortion comprise between 10 and 22%.

At the same time, however, people express ambivalence about abortion and are often reluctant to enter the decision on behalf of others. Most Americans are uncomfortable taking an absolutist stand on abortion; they believe abortion is a private decision which depends on the individual situation. Because people can become uncomfortable when asked to enter the debate, they sometimes qualify their responses if forced to evaluate specific circumstances.

Americans unhesitatingly support choice in the cases of rape, incest, danger to the health of the mother or birth defects. When the circumstances reflect what people perceive as "sex without responsibility", people are less comfortable giving carte blanche. Despite this discomfort, the public recognizes the need for abortion as a last resort. They want this choice treated in a responsible manner, and pro-choice sentiments are highest when the decision is left to a woman and her doctor (74%).

TRENDS OVER TIME

continued

Q: "Do you tend to agree or disagree with this statement: a woman should be able to get an abortion if she decides she wants one no matter what the reason?"

(If disagree, that women should be able to get an abortion no matter what the reason & no opinion) "Do you think abortion should be legal only under certain circumstances or illegal in all circumstances?"

	Always Agree	Sometimes Agree	Never Agree
1986 (February)	**54%**	**34%**	**10%**
1985 (January)	52	36	11
1981 (May)	**40**	**49**	**10**

Source: ABC News/Washington Post Survey #217 (February, 1986).

Subgroups (February 1986)

	Always Agree	Sometimes Agree	Never Agree
All adults	**54%**	**34%**	**10%**
Men	56	34	10
Women	**53**	**35**	**11**
18–30	62	27	11
31–44	**60**	**30**	**10**
45–60	50	39	9
61 and over	**42**	**45**	**12**
Less than high school	41	39	18
High school grad	**55**	**37**	**8**
College	62	28	9
Protestants	**54**	**39**	**6**
Catholics	54	31	14
White	**55**	**35**	**10**
Black	55	32	12
Middle class	**59**	**33**	**7**
Working class	50	35	14

continued

	Always Agree	Sometimes Agree	Never Agree
East	60	32	8
Midwest	50	37	11
South	50	36	13
West	61	29	9
Democrats	55	35	9
Independents	56	31	12
Republicans	52	37	11
City dwellers	61	30	7
Suburbanites	58	32	10
Small towners	52	34	13
Rural dwellers	47	42	11

Source: ABC News/Washington Post Survey #217, 219, 222 (February/March 1986).

Q: "Do you agree or disagree with the following statement: the decision to have an abortion should be left to the woman and her physician?" (November 1984)

Agree	67%
Disagree	25
Not Sure	8

Source: NBC News Election Day Voter Poll, November 6, 1984.

TRENDS OVER TIME

continued

Q: "Do you think abortions should be legal under all circumstances, only certain circumstances, or illegal in all circumstances?"

	All	Certain	Illegal
1985	**21**	**55**	**21**
1983	23	58	16
1981	**23**	**52**	**21**
1980	25	53	18
1979	**22**	**54**	**19**
1977	22	55	19
1975	**21**	**54**	**22**

Subgroups (1985)

	All	Certain	Illegal
Total	**21**	**55**	**21**
Male	20	57	19
Female	**22**	**53**	**24**
18–29	21	57	22
30–49	**23**	**54**	**20**
50 and over	18	54	23
College grad	**31**	**56**	**11**
Other college	23	62	14
High school grad	**18**	**56**	**23**
Less than high school grad	13	47	35
White	**22**	**56**	**20**
Nonwhite	15	49	33
Protestant	**18**	**57**	**23**
Catholic	16	56	26

Source: Surveys by the Gallup Organization for *Newsweek*, January 3–4, 1985.

Q: "Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion..."

	Birth Defect	Married Doesn't Want Children	Health Endangered	Low Income	Rape	Not Married	Her Choice
1984	**77%**	**41%**	**87%**	**44%**	**77%**	**43%**	**37%**
1983	75	37	85	41	78	37	32
1982	**81**	**46**	**89**	**50**	**83**	**47**	**39**
1980	80	45	88	50	80	46	39
1978	**80**	**39**	**88**	**45**	**80**	**40**	**32**
1977	83	44	88	52	80	47	36
1976	**82**	**45**	**89**	**51**	**80**	**48**	**NA**
1975	80	44	88	51	80	46	NA
1974	**83**	**45**	**90**	**52**	**83**	**48**	**NA**
1973	82	46	91	52	81	47	NA
1972	**74**	**38**	**83**	**46**	**74**	**41**	**NA**
1965	57	16	73	22	59	18	NA

Source: General Social Surveys, 1972-1984: Cumulative Code Book. National Opinion Research Center, University of Chicago, July 1984.

Q: "If a woman wants to have an abortion and her doctor agrees to it, should she be allowed to have an abortion, or not? (Asked 8/80,4/81,6/81). "Do you agree or disagree with the following: The right of a woman to have an abortion should be left entirely to the woman and her doctor." (Asked 2/76, 10/77, 11/79).

	Should/ agree	Should not/ disagree	No opinion
1981 (June)	**65%**	**22%**	**13%**
1981 (April)	63	25	12
1980 (August)	**62**	**19**	**19**
1979 (November)	68	28	4
1977 (October)	**74**	**22**	**4**
1976 (February)	67	26	7

Source: CBS News/New York Times Poll

LEGALITY AND MORALITY

Most Americans (74%) believe that abortion will remain legal in the United States. They recognize, however, that under the second term of the Reagan Administration, government action will make it harder for women to get abortions (56%).

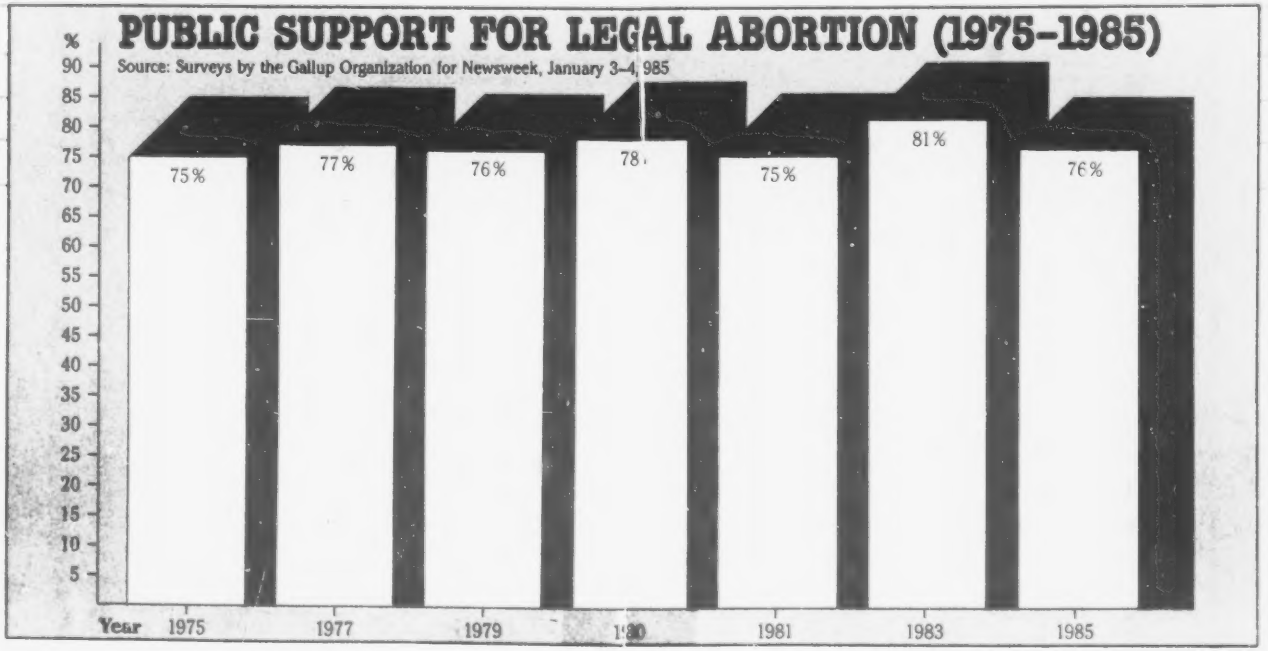
Efforts to restrict access to reproductive choice have been couched in terms of moral debate. However, Americans have refused to accept the abortion debate in the black and white terms of moral or immoral. When given the opportunity to say that abortion is immoral, only 37% of Americans were willing to do so; 58% indicated either that abortion is moral or not a question of morality. While people may be uncomfortable with abortion, most (66%) think it is the best course in a bad situation.

Moreover, polling data also show that people recognize the consequences of making abortion illegal. High percentages of the public predict the following negative effects if abortion were made illegal: Many women would break the law by getting illegal abortions (88%); many women would be physically harmed by illegal abortion (87%); welfare costs would rise to pay for unwanted poor children (70%). People's ambivalence about abortion is partly due to their desire to have people practice better birth control (62%). However, few people (27%) believe that making abortion illegal would improve the moral tone of the country.

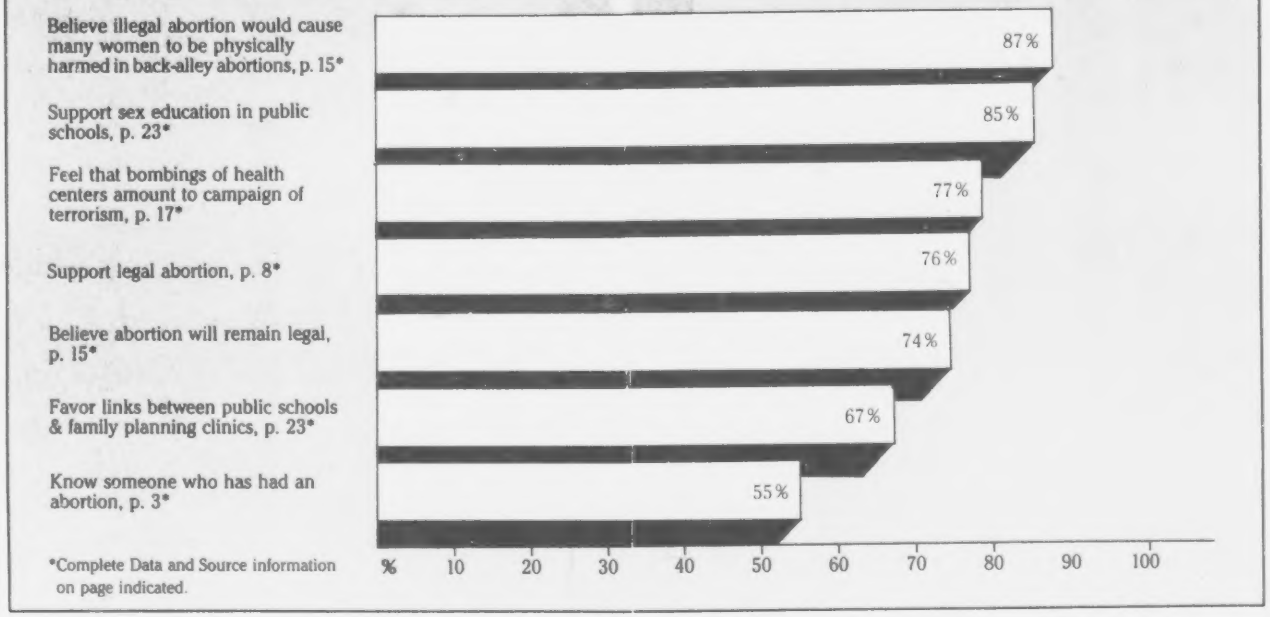
Q: "Do you think that abortion is moral, or immoral, or is it not a question of morality?" (August–September 1985)

	Moral	Immoral	Not a Question of Morality	Not Sure
TOTAL	8%	37%	50%	6%
Men	8	35	51	5
Women	7	39	48	6
Less than high school	7	48	37	11
High school grad	7	36	53	3
Some college	8	33	56	3
Four year college graduate	9	29	58	5
Married or have been married	7	40	47	6
Never married	10	28	58	4
Republican	7	40	48	5
Democrat	9	40	45	5
Independent	8	33	59	5
18–24 years	9	28	60	4
25–29 years	9	32	56	3
30–49 years	6	35	54	4
50–64 years	9	42	41	8
65 and over	6	50	34	9
Know someone close who has had an abortion	6	30	61	3

Source: Harris, Planned Parenthood, (August–September 1985) Table 33, p.74.


PUBLIC SUPPORT FOR LEGAL ABORTION (1975–1985)
Source: Surveys by the Gallup Organization for Newsweek, January 3–4, 985
%
90
85
80
75
70
65
60
55
50
45
40
35
30
25
20
15
10
5
75%
77%
76%
78%
75%
81%
76%
Year
1975
1977
1979
1981
1983
1985

SURVEY OF PUBLIC OPINION ON KEY REPRODUCTIVE ISSUES


Believe illegal abortion would cause many women to be physically harmed in back-alley abortions, p. 15*
87%
Support sex education in public schools, p. 23*
85%
Feel that bombings of health centers amount to campaign of terrorism, p. 17*
77%
Support legal abortion, p. 8*
76%
Believe abortion will remain legal, p. 15*
74%
Favor links between public schools & family planning clinics, p. 23*
67%
Know someone who has had an abortion, p. 3*
55%
% 10 20 30 40 50 60 70 80 90 100

*Complete Data and Source information on page indicated.

LEGALITY AND MORALITY

continued

Q: "Do you agree or disagree with the following statement? Abortion sometimes is the best course in a bad situation."

	Agree		Disagree		DK	
	'83	'85	'83	'85	'83	'85
TOTAL	69%	66%	26%	26%	6%	8%
Men	74	67	22	23	4	10
Women	64	64	29	30	7	6
18–29	70	66	26	30	4	4
30–44	68	68	28	27	4	5
45–64	70	64	24	24	6	12
65 and over	67	65	25	23	9	12
Less than High School	60	60	34	29	6	11
High school grad	70	65	24	27	6	8
Some college	75	69	22	27	4	4
College grad	79	76	17	19	4	5
Protestant	69	66	25	26	6	8
Catholic	66	63	29	30	5	7
White	70	68	25	25	5	7
Black	62	53	27	32	11	15
Less than $10,000	62	65	27	25	11	10
$10–20,000	66	61	30	30	4	9
$20–30,000	67	68	29	29	4	3
$30–40,000	75	74	21	23	4	3
More than $40,000	83	76	12	16	5	7
Republican	74	71	23	21	4	8
Democrat	65	66	28	28	7	6
Independent	72	65	24	28	4	7

Source: CBS News/New York Times Survey

Q: "Do you think that abortion will ever be outlawed in the U.S. again, or do you think it will continue to be legal?" (September 1985)

Will be outlawed	**19%**
Will Continue to be legal	74
Not Sure	**7**

Source: Harris, Planned Parenthood (Table 28, p.69).

Q: "If abortions were made illegal under just about all circumstances, do you think the following would happen or would not happen?" (January 1985)

"If abortions were made illegal..."

	Would Happen	Would Not Happen
■ Many women would break the law by getting illegal abortions	88%	7%
■ Many women would be physically harmed in abortions performed by unqualified people	87	8
■ Wealthy women would still be able to get abortions that are safe	81	12
■ Many more women would end up with unwanted children	72	21
■ Welfare costs would rise to pay for unwanted children of the poor	70	21
■ People would practice better birth control	62	30
■ The moral tone of America would improve	26	59

Source: The Gallup Organization for *Newsweek*, January 3-4, 1985.

POLITICS OF ABORTION

Americans believe that their religious leaders have a right to their own beliefs regarding abortion, but Americans do not approve of bringing politics into the pulpit. Sixty-seven percent of the public think it is inappropriate for religious leaders to urge them to vote for or against a political candidate because of the candidate's stand on abortion.

Q: "Do you think it's appropriate for leaders of your religion to take a public position on the issue of abortion?" (November 1985)

Appropriate	58%
Not Appropriate	33
No Opinion	9

Source: CBS News/New York Times Poll, (November 25, 1985).

Q: "Do you think it's appropriate for them to urge you to vote for or against a political candidate because of the candidate's stand on the issue of abortion?" (November 1985)

Appropriate	26%
Not Appropriate	67
No Opinion	7

Source: CBS News/New York Times Poll, (November 25, 1985).

VIOLENCE TOWARD WOMEN'S HEALTH CENTERS

The public is outraged by recent bombings of women's health care centers. Most think these attacks amount to a campaign of terrorism (77%) and believe there is no justification for these bombings. Americans believe such bombings are criminal acts (85%) and stress that it is not the American way to resort to violence when there is disagreement over national policy (81%).

Q: "A total of 31 abortion clinics have been bombed or attacked by people opposed to legalized abortion. Do you feel such attacks of violence against abortion clinics amount to a campaign of terrorism, or not?" (February 1985)

Amount to terrorism	77%
Do not amount to terrorism	18
Not sure	5

Source: Harris Survey, #10, (February 4, 1985), p.2.

VIOLENCE TOWARD WOMEN'S HEALTH CENTERS

continued

Q: "Now let me read you some statements about the attacks on abortion clinics. For each, tell me if you agree or disagree." (February 1985)

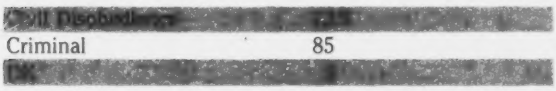
	Agree	Disagree	Not sure
■ It is not the American way to resort to violence when you disagree with a national policy	81%	17%	2%
■ The attacks on the abortion clinics are probably being conducted by fanatics and not people who are concerned with the right-to-life movement	68	28	4
■ The opponents of abortion are right when they say the damage done to the abortion clinics is minor compared with the fetuses whose lives are taken in abortion clinics	41	53	6

Source: Harris Survey, #10 (February 4, 1985), p. 2-3.

Q: "Have you read or heard about the recent bombing of abortion clinics in various parts of the country?" (January 1985)

Yes	90%
No	10

Q: (If yes heard/read) "Would you say those bombings should be described as civil disobedience or should they be called outright criminal?" (January 1985)



Source: ABC News/Washington Post Survey #182, (January 1985).

Q: "There have been a lot of reports lately about bombings of abortion clinics in this country. Which of these statements comes closest to your opinion about these bombings —" (January 1985)

There's absolutely no excuse for these bombings, they're the same thing as terrorism	76%
They're bad, but there are a lot of other crimes that are just as serious	13
If no one is killed or injured, they should be treated as a forceful kind of political protest	5
No opinion	6

Source: CBS News/New York Times Poll, (January 22, 1985).

OPTIONS

People want options in addition to abortion. They are very concerned about teenage pregnancy (84%), and parents express a great deal of anxiety about having little control over their children's sexual activity (64%). Many people favor increased discussion of sexual topics as a way to decreasing the number of teenage pregnancies (62%), and they want to see sex education included in high school instructional programs (75%). The majority of people favor links between public schools and family planning clinics so that teenagers can learn about contraceptives and obtain them (67%). Thus, Americans advocate a full range of options, including sex education, effective birth control, and legal abortion, as solutions to teen pregnancy and other sexuality-related problems.

Q: "Do you think that the number of teenage pregnancies in the United States is a serious problem or not so serious problem?" (August–September 1985)

Serious	**84%**
Not-So-Serious	11
Not Sure	**5**

Source: Harris, Planned Parenthood. (August–September 1985); Table 1, p. 18.

Q: "I'd like your impression of how much control most parents have over their teenagers' sexual activity — a great deal of control, some control, not too much control, or no control at all?" (August–September 1985)

A great deal of control	3%
Some control	32
Not too much control at all	46
No control at all	18
Not sure	3

Source: Harris, Planned Parenthood, (August–September 1985), Table 2, p. 19.

Q: "Where did you first learn about sex—from your mother, your father, friends, sexual partner, sex education courses, or from some other source?" (August–September 1985)

	Total	Male	Female
Mother	21%	8%	33%
Father	5	10	1
Friends	40	46	35
Sexual partner	10	12	8
Sex education courses	8	6	9
Other sources	8	10	7
Reading/books	3	2	3
Sister	2	*	3
Not sure	2	4	1

Source: Harris, Planned Parenthood (August–September 1985), Table 6, p. 23.

OPTIONS

continued

Q: "If there was *more* open discussion in society of sexual topics, would this lead to more teenage pregnancies, *fewer* teenage pregnancies, or would this have *no effect* on the number of teenage pregnancies?" (August–September 1985)

More	9
Fewer	62
No effect	29

Source: Harris, Planned Parenthood, (August–September 1985), Table 12, p. 34.

Q: "Do you feel the public high schools should or should not include sex education in their education in their instructional program?" (May 1985)

TOTAL	75%	19%	6%
Public school parents	81	16	3
Non public school parents	80	15	5

Source: Survey by Gallup for *Phi Delta Kappan*, May 17–26, 1985.

Q: "Which of the following topics, if any, listed on this card should be included in high school?" (May 1985)

	Total	Public School Parents Response	Nonpublic School Parents Response
Birth Control	85	83	88
Venereal disease	84	81	89
Biology of reproduction	82	79	90
Premarital sex	62	59	69
Nature of sexual intercourse	61	57	73
Abortion	60	57	68
Homosexuality	48	45	62

Source: Survey by Gallup for *Phi Delta Kappan*, May 17–26, 1985.

Q: "Next, I'd like to ask you some questions about sex education in public schools. Please say whether you agree strongly, agree somewhat, disagree somewhat, or disagree strongly with the following statement. Sex education should be taught in public schools?" (August–September 1985)

Agree Strongly	**64**
Agree Somewhat	21
Disagree Somewhat	**6**
Disagree Strongly	8
Not Sure	**1**

Source: Harris, Planned Parenthood (August–September), Table 17, p.44.

Q: "Would you favor or oppose requiring public schools to establish links with family planning clinics, so that teenagers can learn about contraceptives and obtain them?" (August–September 1985)

	Favor	Oppose	Not sure
TOTAL	**67**	**29**	**4**
White	65	31	4
Black	**76**	**22**	**2**
Hispanics	76	22	2

Source: Harris, Planned Parenthood, (August–September 1985), Table 20, p. 47.

VOTING ON ABORTION

Finally, when people are given the opportunity to vote on this issue, they clearly demonstrate support for safe and legal abortion for all women. In twenty out of twenty-one state and local ballot measure contests since 1978, voters have reaffirmed support for a woman's right to choose. The only anti-abortion ballot measure to win, in Colorado, did so by less than one percent of the vote. Most of these ballot measures, seventy-five percent, would have outlawed state funding for abortions.

Anti-choice measures at the state and local levels, 1986–1978

YEAR	Measures Proposed	Measures Defeated	Measures Passed
1986	9	9	0
1985	3	3	0
1984	6	5	1*
1982	1	1	0
1978	2	2	0
TOTAL	21	20	1

* passed by a margin of less than one percent.

CONCLUSION

The American public has demonstrated its strong and consistent support for legal abortion. Repeated efforts to sway the public against abortion through extreme and graphic means have been unable to diminish this stable support for legal abortion. Despite all the debate, the public remains committed in its opinions and its votes to keeping abortion safe and legal.

The public recognizes the need for family planning: people use birth control and know others like them who have had abortions. In addition, the vast majority of Americans support access to sex education, effective birth control, and legal abortion as solutions to teen pregnancy and related problems. Americans are clearly committed to preserving a full range of reproductive options.

The polling data in this report were compiled and analyzed by Dr. Ethel Klein of Columbia University.

Produced by the Resource Committee on Reproductive Health Care, and the Women's Media Project of the NOW Legal Defense and Education Fund.

For more information or additional copies, please contact the Women's Media Project, NOW-LDEF, at 202/429-7339, 1776 K Street NW, 9th Floor, Washington, DC 20006.

April 1987.

The CHAIRMAN. Ms. Kiehl, you have just proven that you need not be a lawyer to be eloquent in speaking about the law.

Ms. KIEHL. Thank you.

The CHAIRMAN. The Senator from Alabama.

Senator HEFLIN. Ms. Feinberg, would you give me a little more information on The Nation Institute. I am not familiar with it altogether. Would you give us some information on your membership, and various details about the organization.

Ms. FEINBERG. Well, The Nation Institute is funded solely from private contributions from foundations and individuals who wish to support civil liberties and civil rights.

It is primarily a research and educational organization. It sponsors research and conferences in the civil rights and civil liberties areas. Some of its recent projects include "Justice Watch," a newsletter that looks over Justice Department policies.

Recently there was a conference held for journalists on "The Journal of Critical Opinion." In addition The Nation Institute has the Supreme Court Watch Project which has studied, in a scholarly way, by lawyers, the records of Supreme Court nominees.

So, overall, its policy is to promote education and to inform the public on important issues of civil liberties.

Senator HEFLIN. And what is its membership, primarily? I mean where, in what locations?

Ms. FEINBERG. It is not a membership organization in the sense that we solicit members as opposed to funding. There is a board of directors of The Nation Institute. There is also an advisory board of the Supreme Court Watch Project, and the money that is collected is used to sponsor research.

And there is also a network of volunteers, such as myself, that volunteer our time to help out with these research projects.

Senator HEFLIN. Well, does the funding come from primarily foundations? Where does the funding come from?

Ms. FEINBERG. I know that it is from foundations and from individuals, but it is all private money.

Senator HEFLIN. I believe that is all.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. Thank you very much for your testimony. I would be interested to know if you would care to say how you would vote, if you had to on Judge Bork, if you had to say yes or no. Ms. Kiehl, what do you say?

Ms. KIEHL. Judge Bork? I assume you mean Judge Kennedy. You know how I feel about Judge Bork.

Senator SPECTER. I did mean Judge Kennedy.

Ms. KIEHL. Honestly, as I said I am not a lawyer. The Bork hearings were a real education for me, and it was really clear to me how I felt on that, for the first time we came out on that, for the first time ever.

Are you going to make me say in front of the public how I would vote if I were in your shoes——

Senator SPECTER. You do not have to say. I just ask you if you care to answer?

Ms. KIEHL. I think——

The CHAIRMAN. You can say you do not care to answer.

Ms. KIEHL. I think that I am holding out hope that in fact Judge Kennedy is open to hear about the lives of women, and I trust you to make a really wise decision on that, as you have done in the past.

Senator SPECTER. Ms. Feinberg, would you care to——

Senator HEFLIN. You can say you are undecided, to Senator Specter and myself.

Ms. KIEHL. That way I would get a lot of public attention as well.

Senator SPECTER. Would you care to say? Yes or no?

Ms. FEINBERG. All I can say, really, is that we could not endorse him at this time because of a number of his troubling decisions, and it would be my hope that the Senate through written questions, or other means, would try to probe him on the parts of his record that have not been gone into yet, and I would like to withhold final judgment on him until we have those answers from him.

Senator SPECTER. Mr. Wallace, yes or no? Would you care to say?

Mr. WALLACE. With an explanation. The National Association of Criminal Defense Lawyers has tried studiously not to take a position either for or against the nomination, but, speaking for myself, I think that I have enough faith in his genuine belief in individual rights, and his ability to grow over the next couple of decades on the bench, that I would basically be optimistic that he can be a good Supreme Court Justice, and if I had a vote I would probably vote for him.

Senator SPECTER. Mr. Wallace, you have said that you have some reservations about Judge Kennedy on the *Miranda* decision, and you raise a question, or you make a comment that "Some people need *Miranda* warnings more than others."

Would you say that *Miranda* warnings ought not to be given to people who know their rights, like attorneys general, or sophisticated defendants, or lawyers?

Mr. WALLACE. I certainly do not want to be seen as proposing a needs test for constitutional rights.

Senator SPECTER. Well, how about it? If a person knows their rights, how about the author of the little card with the five warnings?

Mr. WALLACE. Well, that is the point of the waiver process, to determine whether a person knows his rights and can knowingly waive them. But the primary value of the warnings is of course to inform those who do not already know their rights.

Senator SPECTER. Well, I think it is important to note that the *Miranda* warnings have to be given to everyone, whether the person is learned in the law, a chief of police, a district attorney, a Supreme Court Justice. Everyone has to get the *Miranda* warnings, regardless of station in life.

I have just one question on a case, Mr. Wallace, and that is a case that I had referred to earlier, and it is the case of *Burr* v. *Sullivan*, a criminal case involving Judge Kennedy's upholding a district court reversal of a conviction on the ground that there was insufficient cross-examination of defense witnesses at trial.

Where the clue comes early on in Judge Kennedy's opinion, where he says that there was no physical evidence linking the defendant to the arson. And what he is really saying here in a very

hypertechnical sense, that he reverses the conviction where there had been cross-examination.

One was on a motion to strike, and the other was in a closing speech, and went really far beyond the concern or solicitude that judges characteristically give to defendants' rights.

I discussed the case with him in a private session and asked him why he went so far, and that case seems to me to be a pretty sound indicator of a very sensitive concern for rights of a defendant, and I wonder if you agree with that?

Mr. WALLACE. Yes, I do. You have identified what I think, and what our report concludes is his strongest area in constitutional issues affecting criminal defendants, and that is the confrontation clause.

His cases respecting the confrontation clause are very sensitive, sensitive to the right of cross-examination, and to giving real substance to it, and this is an excellent example of a case where he went further than he had to and expressed more indignation than he had to, and picked the record apart more than was actually called for.

Senator SPECTER. Perhaps too much? Cannot have too much?

Mr. WALLACE. I do not think any level of attention to detail, and to every aspect of an individual's rights can be too much.

Senator SPECTER. How about protection for the State?

Mr. WALLACE. I believe that the State's interests ought to be weighed equally on the scales of justice.

Senator SPECTER. Thank you very much, Mr. Wallace. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you all. I think that I announced at the outset of this hearing, the hearing record will remain open until we reconvene. There will be additional questions submitted by me, personally, and by the committee on behalf of Members of the Senate, from Senator Levin, and others, who have indicated they want to ask questions of the judge.

The full record of those questions and answers will be published.

You have all made a very fine contribution, we appreciate your candor, and quite frankly, the scholarship you brought to this process, and the eloquence.

Thank you all very much. I appreciate it.

Ms. KIEHL. Thank you.

Ms. FEINBERG. Thank you.

Mr. WALLACE. Thank you.

The CHAIRMAN. We have two more panels and we appreciate the patience of such distinguished people.

Our next panel consists of several witnesses. Carolyn Kuhl is a partner in the Los Angeles law firm of Munger, Tolles and Olson.

Forrest A. Plant is a partner in the Sacramento law firm of Diepenbrock, Wulff, Plant and Hannegan.

Nathaniel S. Colley is a partner in the Sacramento law firm of Colley, Lindsey and Colley, and an adjunct professor at McGeorge Law School, and maybe one of the most distinguished members of the bar anywhere, and also, quite a race fan, and I believe was former commissioner of racing, if I am not mistaken, under the Brown administration. Maybe I have that title incorrect.

Robert E. Cartwright, a senior partner in the San Francisco law firm of Cartwright, Sucherman, Slobodin and Flower.

And Elizabeth Y. Kepley is the director of legislative affairs of Concerned Women for America. And Professor Paul Bator. Welcome back, Professor. He is a professor of law at the University of Chicago Law School. And we need a slightly larger table.

If you will all, now that you are comfortable seated, stand to be sworn, please.

Do you all swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BATOR. I do.

Mr. PLANT. I do.

Ms. KUHL. I do.

Mr. CARTWRIGHT. I do.

Mr. COLLEY. I do.

Ms. KEPLEY. I do.

TESTIMONY OF A PANEL CONSISTING OF FORREST A. PLANT, PARTNER, DIEPENBROCK, WULFF, PLANT & HANNEGAN: FORMER PRESIDENT, CALIFORNIA BAR ASSOCIATION; CAROLYN KUHL, PARTNER, MUNGER, TOLLES & OLSON, LOS ANGELES: FORMER DEPUTY SOLICITOR GENERAL; ROBERT E. CARTWRIGHT, PARTNER, CARTWRIGHT, SUCHERMAN, SLOBODIN & FOWLER, INC., SAN FRANCISCO: FORMER PRESIDENT, AMERICAN TRIAL LAWYERS ASSOCIATION, FORMER PRESIDENT, SAN FRANCISCO BAR ASSOCIATION; NATHANIEL S. COLLEY, SR., PARTNER, COLLEY, LINDSEY & COLLEY, SACRAMENTO; ELIZABETH Y. KEPLEY, DIRECTOR OF LEGISLATIVE AFFAIRS, CONCERNED WOMEN FOR AMERICA; PAUL BATOR, PROFESSOR, UNIVERSITY OF CHICAGO LAW SCHOOL

The CHAIRMAN. Now I am about to get myself in trouble again here on scheduling. Professor Bator, I am told, has a 6:30 plane. Is that correct? Does anyone else want to claim having a plane to catch? Well, in that case, Professor, why don't we let you—if your fellow panelists are going to indulge you, make it short, please, and then we will allow you to be questioned and leave to catch your plane.

Professor BATOR. Mr. Chairman, my name is Paul Bator. I am a professor of law at the University of Chicago Law School, and am very grateful to the committee for allowing me to appear. I have no prepared statement.

I have been asked by Dean Robert McKay, who was slated to be a witness, but could not do it because of the change in schedule, to submit a statement.

The CHAIRMAN. Without objection, his statement will be entered in the record.

[The statement of Dean McKay follows:]

PROPOSED TESTIMONY OF ROBERT B. MCKAY
AT THE CONFIRMATION HEARINGS FOR
JUDGE ANTHONY M. KENNEDY

My name is Robert B. Mckay. At New York University School of Law I teach constitutional law and professional responsibility. I am a former Dean of that school and former President of the Association of the Bar of the City of New York; but I speak for myself alone, and for no institution.

My acquaintance with Judge Kennedy is not extensive, but has left me with an extemely favorable impression of his intellectual capacity, his integrity and his congenial personality. Our mutual interest arises out of shared admiration for one document and one institution. The institution we both admire is the McGeorge School of Law in Sacarmento, California, where Judge Kennedy has taught constitutional law for many years.

The document in which we share an interest is the Constitution of the United States. His respect for that venerable instrument, as its meaning evolves over time, shines through his opinions, his speeches, and through the admiration of successive generations of his students who enthusiastically endorse his nomination. I know well how difficult it is to persuade students of any view which they believe conflicts with their own opinions.

Undoubtedly, Judge Kennedy's views and mine are likely to diverge on some constitutional questions -- perhaps even more than would be the case with some hypothetical candidate never to be nominated in the real world. I find nothing novel in differences on constitutional issues. Alas, I find no one on the present Supreme Court, and no previous encumbent who got it right all the time, at least when compared with my own views of what is right and what is wrong. The important point is that Judge Kennedy's views, now extensively on the record, demonstrate two things that I consider imporant: First, the views he has expressed are in the mainstream. Whether a little to the right or a bit to the left is less significant than the manifest indication of an interest to stay with the main current. Second, his written product demonstrates a respect for precedent. Like any intellectually capable member of the Court, he may from time to time seek further movement in the law; but there is no evidence of a desire for abrupt departures from carefully developed doctrines of the law.

I will close, perhaps frivolously, by quoting the letter I sent to Judge Kennedy when the President announced his nomination. This is the whole text:

Dear Tony:

Finally, the President has got it right.
Congratulations and best wishes!

Sincerely,

Bob McKay

Professor BATOR. Mr. Chairman, I have known Judge Kennedy since he was a student at the Harvard Law School, and was a student in my class in administrative law. But that is not his only qualification for being on the Supreme Court.

I have followed his career since then with attention and admiration. I will be very brief because it seems to me that the song that is being sung at these hearings is very clear. Judge Kennedy is one of the most admired and admirable judges on the federal bench.

The CHAIRMAN. Excuse me. Would you all please clear the hearing room, and would the officer ask them to carry the conversation out the door, please. Thank you. I am sorry.

Professor BATOR. He is admired, and an admirable judge, and he is admired and is admirable for his qualities of care, fairness, thoughtfulness, openmindedness, and devotion to the rule of law.

He clearly is one of the outstanding jurists of the country. He does not have an explicit dogmatic constitutional philosophy, it seems to me, but underneath his opinions there appears a very firm philosophy of devotion to justice, devotion to law, of modesty and restraint in exercising the power, the immense power of the judge, and the courage and the willingness to speak out on behalf of the law and the Constitution, where that is required.

He has made an enormous impression, in his quiet way, on the law of the country. He is eminently qualified to be a Justice of the U.S. Supreme Court.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Professor, you are one of the eminent professors in the country. In light of the hour, I yield to my colleague from Pennsylvania.

Senator SPECTER. Thank you very much, Mr. Chairman. Professor Bator, thank you for joining us, but I think I will waive any questions at this time, too.

The CHAIRMAN. Professor, you are welcome to catch your plane.

Professor BATOR. Thank you very much.

The CHAIRMAN. We appreciate your testimony and I am going to literally give you a copy of those questions on the way out the door, if I could. Thank you.

I thank the rest of the panel for being so gracious. Now if we could hear testimony in the order in which you were called. Mr. Plant, if you would be first.

Mr. PLANT. Thank you, Mr. Chairman and members of the committee. I am an attorney-at-law engaged in private practice in Sacramento, California. I am a past president of the State Bar of California and of our Sacramento County Bar Association. I am appearing before you to vigorously and enthusiastically support the nomination of Judge Kennedy from the perspective of a practicing lawyer in his hometown, who has for almost 25 years known Judge Kennedy as a lawyer and then as a judge, both personally and by his local reputation.

As a practicing lawyer, he was known for absolute integrity, for hard work, for superior intelligence sensibly applied to his client's problems, for accommodation and fairness in his dealings, for high quality work and excellent results.

I can personally attest to those qualities having dealt with him, and I particularly recall an instance where we were in some hard

negotiations regarding mineral rights, representing clients with adverse interests. They were difficult negotiations but were amicably and mutually settled to the satisfaction of our clients, due in no small part to his contribution to that process.

Although that was many years ago and was early in his career, those same qualities, which to my mind are essential for a fine judge, have marked his service as a judge.

Now there are other witnesses who have appeared before you who are better able than I to comment on his legal decisions, but I am here from the standpoint of personal knowledge and local reputation to tell you that Judge Kennedy possesses in full measure the necessary traits for the high position to which he has been nominated.

He is extremely industrious. He is very intelligent. He is scholarly, as shown not only by his legal opinions but his long service as a professor at law school. He is very objective. He is, as many witnesses have already told you, open-minded, and collegial in his operations, not doctrinaire, not inflexible. He is firm but sensitive and compassionate.

Also I must tell you that based on 38 years of practice and much of it in the courts I believe that the qualities of a judge, of a fine judge are the qualities of a fine person, and Judge Kennedy has those qualities. Bad news travels very fast in Sacramento, and I have never heard anything either by rumor or personal knowledge which in any way would shed doubt on him as a man of the highest integrity and probity.

I urge this committee to make a favorable recommendation on the confirmation of Judge Kennedy.

[The statement of Forrest A. Plant follows:]

STATEMENT OF FORREST A. PLANT

Mr. Chairman and distinguished members of the Committee:

I am an attorney at law engaged in private practice in Sacramento, California. I am a past President of The State Bar of California and of our Sacramento County Bar Association and have also been a Regent of the American College of Trial Lawyers. It has been my privilege to serve as a member of the Judicial Council of California, a constitutional state agency, and am presently acting as Vice-Chairperson of the California Law Revision Commission.

I appear before you to vigorously and enthusiastically support the nomination of Judge Kennedy from the perspective of a practicing lawyer in his home town, who has for almost twenty-five years known Judge Kennedy as a lawyer and then as a judge, both personally and by local reputation.

As a practicing lawyer, he was known for absolute integrity, for hard work, for superior intelligence sensibly applied, for accommodation and fairness in his dealings, for high quality work and for excellent results. I can personally attest to his possession of those qualities from an instance when he and I were representing clients with adverse interests in attempting to reach an agreement regarding mineral rights. They were difficult negotiations, but a mutually satisfactory compromise was ultimately and amicably reached, due in no small

part to his participation in the process. Although that was many years ago and it was early in his legal career, those same qualities, which are to my mind essential for excellence in judicial performance, have marked his service as a judge.

There are other witnesses, as well as the judge himself, who are better able than I to comment on his decisions while on the Court of Appeals. I am in an excellent position, however, based on local reputation and my personal knowledge, to say to you that Judge Kennedy possesses in full measure the necessary traits for the high position to which he has been nominated. He is extremely industrious; he is very intelligent; he is scholarly, as evidenced not only by his opinions but by his years of teaching at the law school level; he is objective; he is open-minded and collegial, not doctrinaire or inflexible; he is firm, but sensitive and compassionate.

Based upon my 38 years of practice, with considerable emphasis on litigation, it is my observation that most excellent judges also possess superior human qualities. Judge Kennedy is such a person. Bad news travels fast in Sacramento, and I'm not personally aware, nor have I ever heard even so much as a rumor, of any circumstance that would shed doubt on him as a person of the highest moral character and probity.

I urge this committee to make a favorable recommendation on the confirmation of Judge Kennedy. All the people of the nation would be well served by him.

The CHAIRMAN. Thank you very much.

Ms. KUHL. And I failed to mention you are a former Deputy Solicitor General in your introduction.

Ms. KUHL. Thank you, Mr. Chairman. It is a privilege to be on a panel with such distinguished members of the California Bar, and I am pleased and honored to have the opportunity of being here to testify in support of the nomination of Judge Anthony Kennedy to be Associate Justice of the U.S. Supreme Court.

I clerked for Judge Kennedy in the years 1977 and 1978, which was his third year on the bench, and I am now a partner in the Los Angeles firm of Munger, Tolles and Olson. As you have mentioned, Mr. Chairman, in the recent past I did serve with the Department of Justice and had an opportunity to concentrate in appellate and Supreme Court litigation in the Civil Division and also in the Solicitor General's Office.

The CHAIRMAN. What years was that?

Ms. KUHL. The Solicitor General's Office was in 1985 and 1986. I began with the Justice Department in 1981, I believe.

The CHAIRMAN. Thank you.

Ms. KUHL. I would like to address two aspects of Judge Kennedy's qualifications for the bench. First, his general approach to deciding cases; and, second, the personal qualities he brings to his work. And, if this begins to sound a little bit repetitive with regard to what other witnesses are saying, I hope that it is convincing you that you are getting a true picture of the man both as judge and as a person.

In terms of Judge Kennedy's approach to deciding cases, judging is, of course, more an art than a science, and so it is not always easy to describe a judge's approach to case decision. But I would like to point to several characteristics of Judge Kennedy's decision-making: his practicality, his collegiality, his courage and restraint. I know the committee's time is short, so I will just touch briefly on each of these.

Judge Kennedy's approach to the law is above all practical, and by that I mean that he is concerned about how a legal principle will work in practice. He, as you know, has been a trial lawyer and a general practitioner, and he understands how lawyers approach their representation of clients, he understands the discovery process and its potentials for abuse, he understands how a case is actually tried to a judge or to a jury, and he understands the types of matters that are best decided at the trial level.

Judge Kennedy understands also that appellate judges, through their decisions, act essentially as supervisors of a very complex legal system. He therefore thinks carefully about how each rule of decision that he sets forth in an opinion will affect the interplay of that legal system.

Judge Kennedy also places great importance on collegiality. I have heard him observe that collegial decision-making is in fact different from individual decision-making. He strives to have good relationships on the ninth circuit with judges with whom he tends to disagree as well as with judges with whom he tends to agree.

He also has great respect for what is called the Law of the Circuit. That is, he decides cases consistently with cases previously decided by the ninth circuit. If he disagrees with circuit precedent, he

may seek to have the issue reviewed by the ninth circuit en banc, but he does not simply ignore prior precedent or seek to distinguish it on some spurious basis.

Judge Kennedy also has demonstrated courage in his decision-making, and that quality is important especially for Justices of the Supreme Court, who are faced more often than most judges with cases in which the branches of our government are pitted against each other. An example of Judge Kennedy's courage in striking down an action that cannot be squared with the Constitution is his decision in *Chadha* v. *Immigration and Naturalization Service.* In addition, he has been just as vigilant in halting or reversing executive branch actions when he has found them contrary to law.

While Judge Kennedy shows courage in striking down improper actions of the political branches, he also shows restraint in exercising this judicial power. His own personal views of right and wrong do not govern his decisions. He always tries to follow the letter and intent of the statute or Constitution, letting justice be defined by the written law rather than by the feelings or beliefs, however sincere, of himself and his fellow judges.

I especially remember one case where Judge Kennedy articulated personal distress about the particular consequences to the individual plaintiff of a district court's decision. Nonetheless, Judge Kennedy upheld the district court because he believed that that result was in fact required by an honest application of the relevant statute and of the existing circuit precedent.

Turning then briefly to the personal qualities that Judge Kennedy brings to the bench, he is a man of compassion, as I have just noted, in his personal approach to trying to understand what is happening to a plaintiff in a case. He is a man of great humility; he is not someone who is influenced by the statements of others, by deference to him, by people coming up to him and indicating he is someone important. And I think humility is very important when a person goes on the Supreme Court, which is a very isolated and formal existence.

Judge Kennedy has many other fine qualities. I know the committee's time is short. Suffice it to say that if Judge Kennedy is confirmed the current Supreme Court Justices will be very lucky indeed to have so genial a colleague and the country will be well served by a jurist of proven integrity and ability.

Thank you, Mr. Chairman. And my thanks to the committee.

[The statement of Carolyn B. Kuhl follows:]

STATEMENT OF CAROLYN B. KUHL
IN SUPPORT OF THE NOMINATION
OF JUDGE ANTHONY M. KENNEDY
BEFORE THE SENATE JUDICIARY COMMITTEE
December 17, 1987

I am pleased and honored to have the privilege of appearing before this Committee in support of the nomination of Judge Anthony M. Kennedy to be Associate Justice of the United States Supreme Court. I was Judge Kennedy's law clerk during his third year on the bench, in 1977 and 1978. I am now a partner in the Los Angeles law firm of Munger, Tolles and Olson. In the recent past I served in the United States Department of Justice for five years, where I had an opportunity to concentrate in appellate and Supreme Court litigation as Deputy Assistant Attorney General in the Civil Division and as Deputy Solicitor General.

I will address two aspects of Judge Kennedy's qualifications for the High Court: first, his general approach to deciding cases, and second, the personal qualities he brings to his work.

The business of judging, of deciding cases, is complex. Though some would wish for a system in which results are fully predictable, and decisionmaking a matter of automatic application of well-defined syllogisms, our legal system is not so. Judging is more art than science. Thus, it is not easy to explain or analyze how a judge decides cases. But I will try to describe several characteristics of Judge Kennedy's decisionmaking: practicality, collegiality, courage, and restraint.

Judge Kennedy's approach to the law is, above all, practical. By that I mean that he is concerned with how a legal principle will work in practice. Judge Kennedy was a trial lawyer and a general practitioner. He understands how lawyers approach their representation of clients, the discovery process and its potential for abuse, how a case is actually tried to a judge or jury, and what types of matters are best determined at the trial level. Judge Kennedy understands that appellate judges, through their decisions, are supervisors of a complex legal system. He thinks carefully about how each rule of decision set forth in an opinion will affect the interplay of that system.

Judge Kennedy also places great importance on collegiality. I have heard him observe that collegial decisionmaking is different from decisionmaking by an individual judge. He strives to maintain good relationships, based on mutual respect, with other Ninth Circuit judges with whom he tends to disagree, as well as with those with whom he usually agrees. I think he has generally been successful in this effort. Judge Kennedy also believes that there should be one, consistent body of precedent within a circuit. Thus, he has great respect for the "law of the circuit;" that is, he decides cases consistently with the cases previously decided in the Ninth Circuit. If he disagrees with circuit precedent he may seek to have the issue reviewed by the Ninth Circuit en banc, but he does not simply ignore prior precedent or purport to distinguish it on a spurious basis.

Judge Kennedy has demonstrated courage in his decisionmaking. That quality is important for all judges, but is especially vital for Justices of the Supreme Court who are faced more often with cases in which the Branches of our Government are pitted against each other. A Justice of the Supreme Court must have the courage to confront the Political Branches if they should act in contravention of our Constitution. Judge Kennedy has faced and met that challenge. His decision in Chadha v. Immigration and Naturalization Service, (which was upheld by the Supreme Court), analyzed carefully, and then declared unconstitutional, the legislative veto device that had been used by Congress for decades in dozens of statutes. He has been as vigilant in halting or reversing Executive Branch actions when he has found them contrary to law.

But while Judge Kennedy has shown courage in striking down improper actions of the Political Branches, he has shown restraint in exercising this judicial power. His own personal views of what is right and wrong do not govern his decisions. He strives always to follow the letter and intent of statute or Constitution, letting justice be defined by written law rather than the feelings or beliefs, however sincere, of himself and his fellow judges. I remember especially one case where Judge Kennedy articulated great distress about the personal consequences to the individual plaintiff of the district court's decision. Nonetheless, Judge Kennedy upheld the district court because he believed that that result was required by an honest

application of the relevant statute and existing Circuit precedent.

This brings me to the personal qualities Judge Kennedy would bring to his work on the Supreme Court. Judge Kennedy gave you some idea of what kind of person and what kind of judge he is when, in response to this Committee's questionnaire, he described the key qualities of a judge as "compassion, warmth, sensitivity, and unyielding insistence on justice." I have already mentioned Judge Kennedy's expression of sorrow and compassion for the consequences of a particular statutory requirement to a plaintiff. While he did not often articulate to his clerks his personal feelings about cases, I believe his compassion and sensitivity show through in his decisions.

I would be remiss if I did not mention Judge Kennedy's humility. Lawyers comment among themselves that men and women often tend to change and to become aloof after they take the bench. Judge Kennedy, however, has avoided that phenomenon. I can recall his discomfort when lawyers or others in Sacramento's legal community would come up to him and greet him in an obsequious manner, recognizing his status as one of Sacramento's highest ranking federal officials. Humility, it seems to me, is an extremely valuable trait for one who is to spend the rest of his career in the very formal and isolated environment of the Supreme Court.

Finally, Judge Kennedy is unselfish. Whenever I speak to someone who has met Judge Kennedy, I hear stories of his kindness to others, of his doing small human acts as simple as holding the door for another judge's law clerk. When I clerked for Judge Kennedy, any of his law clerks who could not be with family on a holiday could be sure of an invitation to the Kennedys' own family celebration. Perhaps this character trait is what makes collegiality so important to him.

Judge Kennedy has many other fine qualities, but I know the Committee's time is short. Suffice it to say that if Judge Kennedy is confirmed, the current Supreme Court Justices will be lucky indeed to have so genial a colleague, and the country will be well served by a jurist of proven integrity and ability.

Thank you again for this opportunity to be here today. I would be happy to answer any questions the Committee may have.

The CHAIRMAN. Thank you.

Mr. Cartwright, welcome. Good to see you again.

Mr. CARTWRIGHT. Thank you, Mr. Chairman. I am very happy to be here and pleased to have the opportunity to speak on behalf of Judge Kennedy. I know the hour is late and I have been told that I should be very brief, so I will summarize the remarks that I had otherwise planned to make, and also will ask to have my written paper or statement submitted into the record.

The CHAIRMAN. The entire statement will be placed in the record.

Mr. CARTWRIGHT. Thank you. Just a couple of brief words about myself, so you will know where I am coming from. I am what is known as a plaintiff's trial lawyer. This means that I specialize in the handling of cases where individuals in our society have been injured or harmed, whether by government, or insurance companies, manufacturers, or even private individuals. This harm can be by way of personal injury, property damage, violation of their civil rights, and oftentimes their economic rights as in business or commercial cases.

I had the privilege of being the president some years ago of the Association of Trial Lawyers of America, commonly called ATLA, and also the California Trial Lawyers Association, among other organizations.

I have known Judge Kennedy for many years. I know his reputation in California. I have read a number of his decisions and quite a few of his speeches. I can tell you without any qualifications whatsoever that in California, where I come from, Judge Kennedy is highly respected by all members of the bench and bar, without exception, and without regard to their political persuasion. Parenthetically, in that regard, I am a Democrat. He is respected as a man of superior intellect and the utmost integrity.

Now just a few words about the qualifications of Judge Kennedy that I am particularly interested in, and that is in whether or not he is a judge who is interested in protecting, promoting and preserving the rights of innocent people, who are harmed or injured in our society, in obtaining redress.

Judge Kennedy has given a number of speeches, primarily with reference to the criminal field, and a constant theme that you see running through his talks is the forgotten man, or the forgotten person, and that is the victim of wrongdoing in our society. I know from conversations with him that he is equally concerned about the innocent victim of wrongdoing in our civil justice system, as well as in the criminal justice system, and that if he becomes a member of the Supreme Court that he will endeavor to the very best of his ability to protect the rights of all innocent victims whether in the criminal field or the civil justice field.

I know that he has a very abiding belief in our tort system, which is our civil justice system to rectify wrongs. He believes, as do I, that it serves a very useful purpose, that it has a prophylactic and therapeutic effect in not only providing compensation to the person who has been injured, but also in helping to prevent injuries in the future and preventing the same kind of wrong from occurring in other cases.

Finally, I do not believe, as some people feared with reference to Judge Bork, that Judge Kennedy is going to turn back the clock on all of the wonderful safety progress, people progress, the civil rights progress, and so forth, that we have made in this country in the last 50 years. I don't think that at all.

In my judgment, from my knowledge of Judge Kennedy and my experience with him, I believe that he is a person who has a feeling for people, that likes people. I feel he is sensitive. I think he is compassionate, and I think he is going to be a judge who will watch out for the rights of all of our citizens in this country, and that he will make a fine Supreme Court Justice. And I urge this committee to affirm him. Thank you.

The CHAIRMAN. Thank you, Mr. Cartwright.

[The statement of Robert E. Cartwright follows:]

WRITTEN STATEMENT RE CONFIRMATION OF JUDGE ANTHONY KENNEDY'S NOMINATION TO THE UNITED STATES SUPREME COURT

By ROBERT E. CARTWRIGHT, ESQ.
San Francisco, California

This statement is filed in support of Judge Anthony Kennedy's nomination to the United States Supreme Court. I am senior partner in the San Francisco law firm of Cartwright, Slobodin, Bokelman, Borowsky, Wartnick, Moore & Harris, Inc. located at 101 California Street, 26th Floor, San Francisco, California 94111. My practice and that of my firm of some 23 attorneys is limited to the processing and trial of civil cases only arising out of wrongful acts or omissions of the government, manufacturers, insurance companies, businesses and/or private individuals thereby causing injury, harm or damage. The injury, harm or damage may be personal injury, wrongful death, violation of civil rights and what are commonly called business or commercial torts to persons or companies involved in business.

Our practice is overwhelmingly confined to the representation of plaintiffs, i.e. the victims of said wrongful acts and omissions as distinguished from representing the defendants and/or the wrongdoers. Our focus thus is on obtaining redress under the civil justice system for the victims of wrongful acts and/or omissions and our concern with the election and/or appointment of judges is in obtaining

judges who have the courage, the heart and the desire to protect the rights of innocent victims of civil wrongs in our society when justice and equity indicates and mandates that there should be a remedy for the wrong committed, no matter whether same is by government, manufacturers, insurance companies or other large vested interests and/or individual tortfeasors.

I have practiced in this particular specialty for over 35 years with my offices during this time located in San Francisco, California. During those years among other honors, I have served as the President of The Association of Trial Lawyers of America (ATLA - 1974-1975), the California Trial Lawyers Association (CTLA - 1967-1968) and the San Francisco Trial Lawyers Association (SFTLA - 1964-1965). In 1985 I had the privilege of serving as President of Trial Lawyers for Public Justice. This is a public interest law firm which I helped found and which has its headquarters in Washington, D.C. It has as members or partners therein approximately 500 of the most dedicated and capable plaintiff trial lawyers in America. This firm has been financed by our members and is devoted to handling causes in the civil justice field which have not historically been handled or redressed by either the public sector or the private sector.

I have co-authored two books on products liability,

have written many articles and have lectured on trial practice and procedure as well as substantive aspects thereof in most of the states, including Alaska and Hawaii. With reference to appellate cases, I have had a number of personal cases where I handled the appeal. Additionally in my capacity as a member of the California Trial Lawyers Association Amicus Curiae Committe for approximately 20 years and as chairman for 12 years, I have participated in over 100 landmark California appellate court decisions during the last 25 years, most of which were at the Supreme Court level. I accordingly have had extensive experience at the appellate level in the presenting of briefs and the arguing of cases, albeit almost always on the side of the plaintiff or victim. Attached hereto is my curriculum vitae which sets forth in much greater detail my background, experience and orientation.

I have known Judge Kennedy for approximately 20 years and am familiar with his reputation in California as a distinguished scholar, lawyer and jurist. To my knowledge, Judge Kennedy is uniformly held in the highest regard in California by all members of the bench and bar. This is without regard to their political persuasion and/or whether they are plaintiff or defense lawyers.

Judge Kennedy is considered to be a man with impeccable credentials. He did his undergraduate work at Stanford

and then went to Harvard Law School. He was a Phi Beta Kappa in his undergraduate work at Stanford and is considered to be a jurist with superb intellectual abilities.

He has the distinction of having worked in a large corporate type law firm and from there he took over his father's general practice when his father died and thereafter handled all kinds of cases, first as a sole practitioner and then later in partnership for private individuals and small businesses. He did this until he was appointed as a judge of the United States Appeals Court in 1975. Since his appointment to the bench in 1975, he has authored over 400 extremely well written and reasoned decisions and has participated in over 1300 opinions. I have personally read a number of his decisions and while I don't agree with the holding in every one of them, I find that his legal writing skills and analytical abilities are excellent. He writes clearly, concisely and persuasively in setting forth his point of view. He has a reputation of being willing to listen to the attorneys who argue before him and of being courteous and fair in his treatment of said attorneys.

With reference to his knowledge of constitutional issues, it is significant in my opinion that Judge Kennedy for approximately the last 20 years has taught constitutional law in Sacramento at the McGeorge School of Law. His reputation

as a teacher is excellent. It is my understanding that he has been well received and extremely well liked by his colleagues at McGeorge and by the students who he has taught. He certainly understands not only our constitution but the decisions which have been rendered through the years interpreting the constitution.

This leads us to the issues which I would like to address and which are of vital concern to the ordinary citizen in this country and particularly to those who either have been or will become innocent victims of injury, damage and/or harm, either to their persons, their personal relations and/or in their business pursuits. Will Judge Kennedy turn back the clock as many feared would be the case with Judge Bork with reference to the tremendous advancements and improvements that we have seen in recent years in the fields of civil rights, personal rights, products liability, medical malpractice and in the field of business or commercial torts? Does he believe in our civil justice system and in the right of individuals who have been wronged or harmed to obtain redress? Does he believe in our tort system and the right to vehicles and/or procedures to protect and enforce the rights of our people?

The answer to all of the above questions, in my opinion, is that Judge Kennedy will not turn back the clock and that he will be a vigorous and forceful enforcer of the

rights of our citizens to obtain redress and justice under our civil justice system. I have talked personally with Judge Kennedy about a number of these issues. I have read a number of his decisions. I have either read verbatim or summaries of a number of his speeches that he has given with reference to his views and I have personal knowledge of his reputation. Judge Kennedy has told me personally that he does believe in our tort system, that he understands the wonderful therapeutic and prophylactic effect that it has in preventing and/or deterring wrongful acts or omissions, thereby saving injuries, lives and economic damage to others in the future as well as compensating those who have already been harmed. Judge Kennedy personally after taking over his father's practice had the privilege and opportunity of representing ordinary citizens in our society and he understands the necessity of protecting the rights of those who have been innocently harmed or injured.

He has spoken on the fact that the forgotten person oftentimes, particularly in criminal cases is the victim, and he has been vigilant in his opinions in endeavoring to strike a proper balance between protecting the rights of the victims and yet observing proper procedural constitutional safeguards for the accused. While he hasn't participated in as many tort cases as he has criminal, it is self evident

to me, however, that this same philosophy of zealously protecting the rights of victims against government, insurance companies and others has been and will continue to be adhered to and observed by Judge Kennedy in the cases that come before him.

There are a number of such civil cases which I could cite, but just to illustrate, I will mention three. The first is Ramirez v. United States of America, (1977) 567 F.R.2d 854 et seq. in which he held in an extremely well written and reasoned opinion that an action may be brought under the Federal Tort Claims Act to recover for the alleged negligence of a government physician in failing to warn a patient of the risk of a particular operation - i.e. the failure to obtain a proper informed consent. Judge Kennedy and his court held that this failure to obtain a proper informed consent did not fall within one of the exceptions to the Federal Tort Claims Act. It does not allow recovery where there has been a misrepresentation or deceit by a government employee. In the case of Morrill v. United States, (1987) 821 F.R.2d 1426 et seq. Judge Kennedy held that a go-go dancer at a government facility who was assaulted by a Navy enlisted man and raped was not precluded from recovery against the United States Government under the Federal Tort Claims Act because of another exception contained in the Federal Tort Claims Act, namely, that

there can be no recovery for assault and battery by a government employee. Judge Kennedy and his court held that the government could be held liable for its independent negligence in failing to properly supervise and control the government facility, the premises and the people in question.

In Kalland v. North American Van Lines, (1983) 716 F.R.2d 570 et seq., the issue involved apportionment of liability between two defendants. The issue involved a rather esoteric issue, namely, the intertwining of the defendants' causal connection with the accident as distinguished from their percentage share of negligence under comparative negligence principles. Judge Kennedy in a very clear and extremely well written opinion points out that the apportionment between the two defendants is to be made on the basis of their relative percentage of negligence where the injury caused is indivisible and it cannot be said which defendant caused the injury in question.

I believe that it is clear from reading Judge Kennedy's decisions and from talking to him and from reading his speeches that he understands that neither the constitution and/or the common law should be like a straight jacket and/or a stagnant pond and that both must keep pace with the times, needs and requirements of society. In a recent speech in Hawaii for

example, he suggested that "Besides the constitution itself, the courts and government must also heed an unwritten constitution that consists of our ethical culture, our shared beliefs, our common vision. . . ." He said this unwritten code is an additional brake, an additional restraint on government powers. While he didn't specify exactly how this may work, it isn't too difficult to conclude from his remarks themselves that Judge Kennedy would find in accordance with and approve those fundamental concepts that all right thinking people believe in, such as the right of privacy, the right to vote and the right to travel from state to state, even though they aren't specifically set forth in the constitution. Perhaps even more importantly from the standpoint of the civil justice system and the right of innocent victims such as those I represent to recover, I would perceive this to mean that Judge Kennedy understands that there are certain fundamental principals upon which this country was founded and which still exist as taught to us in our churches, in our schools and in our homes, namely, our "shared beliefs," such as principles of good faith, fair dealing, business morality, honesty and integrity and that if these are violated by anyone including the government, insurance companies, manufacturers

or other tortfeasors that there must be a remedy to allow recovery for the violation and breach of these "shared beliefs."

In short, I believe that we will be in good hands with Judge Kennedy and I urge his confirmation. I am confident that he will go down in history as one of our truly great Supreme Court justices and that he will make us proud.

The CHAIRMAN. Mr. Colley, it is a distinct pleasure to have you here and, quite frankly, somewhat reassuring. You have been, if I am not mistaken, president of a national bar. You have been a man deeply involved in civil rights issues all your life, and I am anxious to hear what you have to say about this gentleman.

Mr. COLLEY. Thank you very much, Senator Biden. It is a pleasure for me to be here also, and I can assure you that I would not be here if I didn't have reasonable cause to believe that Judge Kennedy will be an outstanding member of the Supreme Court of the United States.

I want to tell you that I am one of these people who have known him for a long, long time. I even go further than that; I knew his father. He practiced law in Sacramento. When I came to Sacramento there was some question, believe it or not, whether I should be admitted to the local bar association, even though I had passed the State bar examination.

The CHAIRMAN. What year was that?

Mr. COLLEY. This was in 1949. And it was Archibald Mull, a local lawyer, and Mr. Kennedy's father who at once took steps to see that there were no barriers placed before me, and in fact they encouraged me to apply for membership in the American Bar Association, and of course I was accepted. You will have to remember that at the time I am talking about black members were not welcome to the Los Angeles Bar Association. But in Sacramento, my welcome was complete and total from the beginning, largely through the work of two people. That was Archibald Mull and Mr. Anthony Kennedy Sr. Well, it is not senior because their middle initials are different. But anyway, I want to make that point very clear.

And, if Judge Kennedy went astray on racial issues, it happened to him long after he left home. Now, I heard that he went to Stanford. That might have had some influence on him adversely. I hope not.

The CHAIRMAN. Where did you go to school?

Mr. COLLEY. Well, first I went to Tuskegee, in Alabama.

The CHAIRMAN. Don't brag, just get to the end.

Mr. COLLEY. I went to Yale, but I went there because Stanford didn't welcome black people then, Columbia had a quota, and Harvard was too far from Harlem. So I went to Yale.

The CHAIRMAN. And if I am not mistaken, you graduated with distinction from Yale.

Mr. COLLEY. Well, yes. That is because—I want you to know that I am not from the Establishment. Everybody has been asking about the Establishment.

The CHAIRMAN. You are sure sounding like it, though.

Mr. COLLEY. No, I am not a part of the Establishment. I was born in rural Alabama, and I represent something I think is special in America; and that is, you can come from anywhere and go anywhere if you really try. And I came from rural Alabama where I was unfit for picking cotton from the very outset. My mother recognized this and she encouraged me to read books, and, of course, that was very important in my life. I ended up as an officer in the Army, for instance. You will never know how much trouble it gave me to lead a black company in the Solomon Islands and in the

Philippine Islands and in New Guinea, and people have asked me "Why are all the people in your company black?" And I also recognized racial segregation and the evils of it. I determined at that time that something had to be done about this, and so I made the bold move of deciding to go to law school.

Now, my very good friend Joe Rauh was here today and I saw him on the television screen. Joe and I served on a national board for more than a dozen years together, and I can't remember a time we differed. So when he testified this morning, I could only say, "Lord, forgive him for he knows not what he does." I know Judge Kennedy better than he does. He is drawing inferences from some writings. I am offering direct testimony of my own observations and my own beliefs.

I have a prepared statement, which I offer in evidence—I am not going to analyze again the cases of Judge Kennedy that I have analyzed in my paper. I will answer questions about them if anybody wants to ask me.

Judge Kennedy and I performed a service in Sacramento for many years. We are both adjunct professors at the local law school. He teaches constitutional law and I teach jurisprudence or philosophy. We often have the same students. There is a great interchange between our students. Only the better students want our courses anyway, because the other people are concerned about evidence and contracts and what they call bread and butter courses. I can tell you that from his students you get the best reports you get from anyone, and there is just no doubt about it whatsoever.

Now, I know Judge Kennedy has made mistakes in some of his decisions. I don't agree with all of them, and I say that in my prepared texts. But who is it among us who has never made a mistake? I don't know any such person as that.

With reference to his membership in private clubs, I can tell you that whenever he wanted to talk with me he would call me for lunch, but he never asked me to go to the Sutter Club, which is one of the clubs that has been mentioned, because he knew my views about that club. My views go back for many, many years, when they didn't tear it down in redevelopment. They tore down every other private institution but left the Sutter Club because of the power it represented. There is just no doubt about it.

But long before he was a candidate for the job he is now about to take he did, in fact, resign from the Sutter Club because of its discrimination against women. That seems to me a great plus because we have to realize that this business of not joining clubs which discriminate is a part of a new enlightenment. This hasn't always been the view in America. And, if we took from the Senate every member who had ever joined one of these clubs, I doubt whether you would get a quorum. And I know that is a distinguished body and I respect it tremendously.

So I don't think we need to take the past and transport it into the present and say that everybody now who did not have the views 10 years ago that we have now is some sort of bad person. That is bad reasoning.

I would submit my case and tell you, just by closing, that Judge Kennedy embraces *Brown* v. *School Board.* He has said so many times. He has never said anything to the contrary. And so far as

black people in America are concerned, that decision is our Magna Carta, and he who embraces it embraces us. I want to return a symbolic embrace of Judge Kennedy and ask you to do the same.

Thank you.

[The statement of Nathaniel S. Colley follows:]

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Testimony of NATHANIEL S. COLLEY, SR., Senior Partner, Colley, Lindsey, and Colley, Attorneys at Law, 1810 "S" Street, Sacramento, California 95814, In Support of The Nomination of Judge Anthony M. Kennedy To The United States Supreme Court Given Before The Judiciary Committee of The United States Senate on December ___. 1987.

Mr. Chairman, and Members of The Committee.

My purpose today is to express my unqualified endorsement of Judge Anthony M. Kennedy for confirmation as a member of the United States Supreme Court. I am here because I know Judge Kennedy well. He is a man of great integrity who has a sincere devotion to the rule of law. While I realize that I am not here seeking confirmation of myself, it seems appropriate that you know who I am so that you can better evaluate the worth of my remarks.

I was born in rural Alabama, but it became evident quite early that my talents were not in picking cotton. Only my mother believed me when I insisted that all farm labor made me sick. Her love was so great and her belief in me so strong that when others said I was a lazy faker her reply was that so far as she was concerned if I said it made me sick, it made me sick. The truth of the matter is that it did make me sick. I was allergic to almost every blade of grass, wild flower bloom or domestic crop which grew in Alabama. My eyes itched and fluid flowed from my nostrils. That was real sickness in an era before anti-histamines were put in general use. In addition to the impediment imposed by my allergies, I was too skinny and clumsy to excell in any endeavor which required physical agility.

I shall be forever grateful for the fact that my mother believed in the Bible which teaches that everyone has a talent. She knew that mine was not in physical activity. For that reason she convinced me that my talent is in my mind, and I should read books and do something in life which does not depend upon superior physical performance. This led to the idea of going to college, even though no member of

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my immediate family had been so bold as to dream to reach such a high goal.

I attended Tuskegee University on a five-year work scholarship and graduated with highest honors. Later I was a Captain in a racially segregated U.S. Army unit. That was a disturbing experience because I questioned the propriety of risking my life for democracy abroad even though for my people it did not exist at home.

An ever present brooding over the unequal condition of Black people in almost every facit of American life literally dictated my career choice. As a lawyer I thought I could be in a better position to seek social change within the framework of constitutional limitations. The federal government had the G.I. Bill of Rights in place for those of us who sought further education. In those days Stanford did not welcome Blacks, Columbia had a quota system, Harvard was too far from Harlem, so I went to Yale.

Since January 11, 1949, I have continuously practiced law in Sacramento, California. One of the greatest joys of my life is having our son and one of our daughters as my law partners.

It was my pleasure to know Judge Kennedy's father. He and the late attorney Archibald M. Mull, Jr., made it a point to see that I was well received as a member of the Sacramento County Bar Association even though it had never had a Black applicant or member, and the Los Angeles Bar Association had no Black members. They also encouraged me to apply for membership in the American Bar Association. They accepted me. That was in the year 1949, and I can assure you that these were bold moves at that time.

Suffice it to say, however, I am not here out of gratitude for the friendship of Judge Kennedy's late father. That friendship, however, is relevant because it shows the type of home in which Judge Kennedy was reared. If Judge Kennedy has gone astray on racial issues, and I know of no evidence that he has, it must have happened after he left home.

You are aware of the fact that at least one civil rights group has announced its objections to the confirmation of Judge Kennedy on the ground that he lacks sensitivity to the problems of ethnic minorities. They have offered three of his opinions as evidence in support of their position. I have carefully read and analyzed each of those opinions. In none of them did I find one scintilla of evidence that Judge Kennedy is insensitive to the struggle of ethnic minorities to achieve full participation in every aspect of American life. Each of the cases cited was decided on narrow procedural grounds. It might be helpful to briefly discuss each of the ones to which reference has been made.

1. TOPIC vs. Circle Realty, 532 F.2d 1273 (1976).

This case involved a claim by a local citizens organization that real estate brokers in two small Los Angeles County cities were steering Black home buyers to Black neighborhoods, and White home buyers to White neighborhoods. Judge Kennedy held that since the citizen's group was attempting to assert the rights of others it did not have standing to sue. He also held that the action was brought under Title 42 Section 3612 of the Fair Housing Law, and that section permits suits only by those who themselves have been direct objects of housing discrimination. Another section of the law, Section 3610, Judge Kennedy said, confers standing upon community groups such as TOPIC, but exhaustion of administrative remedies is a predicate to suit in federal court under the latter section.

In my judgment Judge Kennedy erred in the TOPIC case by giving too narrow an interpretation of the statute involved. It is written in the books, however, that "To err is human, to forgive is devine". I say let those who have never made an honest error cast the first stone. Further, a case may be made for the claim that the administrative remedy found in Title 42 Section 3610 is far less expensive and more expedient than direct court action. If that is not true Congress engaged in futile action in passing the fair housing law because court remedies have been

available for over a century. Congress obviously felt that the court remedy was inadequate to deal with the pervasive racial discrimination in housing in this country Judge Kennedy has never said that either remedy should be abolished. All he held was that those who are not direct victims themselves should be restricted to a different procedure. Those who see an insensitivity to the rights of minorities in that decision have strained at a gnat and swallowed an entirely unrelated camel.

2. Spangler vs. Pasadena City Board of Education, 552 F.2d 1326 (1977).

In this case, seven years after a decision which found de jure racial segregation to exist in the Pasadena, California public schools, a group of Black parents who were not parties in the original suit requested the court to enjoin certain school board practices. The parents did not file a formal motion to intervene in the case. Judge Kennedy held that since the parents did not file a motion to intervene they were not parties to the action and could not attack the alleged unlawful discriminatory practices. He expressly held that if on remand the parents filed a motion to intervene the U.S. District Court should hold a hearing and decide the question of the need for the parents to intervene.

Judge Kennedy expressed no opinion as to the merits of the claims made by the parents. He simply held that they should move to intervene if they wished to participate in the litigation. It is certainly not an expression of racial bias for a Court to require that those before it be either intervenors by motion or parties by joinder. It is difficult to see how else the court can supervise its affairs and enforce its decrees.

3. Aranda vs. Van Sickle, 600 F.2d 1267 (1979).

This case was brought by Mexican-Americans to invalidate an at-large system used by San Fernando, California for the election of members to the City Council. Judge Kennedy affirmed summary judgment against the plaintiffs on the ground that they had failed to raise a genuine issue of fact indicating that they had been denied access to the political process, or that the at-large election scheme constituted a purposeful device for racial discrimination.

It is my view that in that case both the circumstantial and direct evidence produced by the plaintiffs should have precluded the granting of summary disposition of the case, and that Judge Kennedy should have voted to reverse the judgment. This view, however, does not lead me to an irrational conclusion that the decision tends to prove that Judge Kennedy is a racist. He belived in good faith that the U.S. Supreme Court precedents did not justify a different result.

In addition to the objection to the foregoing opinions rendered by Judge Kennedy some of my friends urge his rejection because of his past membership in organizations and clubs which do not have women or ethnic minorities as members. Membership in such clubs in this day and age in America is suspect, but we all too often forget that the present attitude has not always prevailed. If you expelled every member of the Senate who has held such a membership I hazard the guess that you could not get a quorum.

Let us remember that in the past we have all sinned. This society has always been highly polorized along the lines of race. Many Black organizations had no White members and did not desire to have any. Most White organizations had no Black members and fought to keep it that way. There were exclusively male clubs and female clubs.

Recently, however, a new age of enlightenment is being born, but lifting the veil of ignorance and prejudice from the eyes of a people is a slow and painful task. Some who truly desire to see racism banished from our society use the shock effect of immediate resignation from such clubs, others remain within and use their influence in an effort to persuade these groups to enter the new age of enlightenment. The vast majority of poeple will take no action at all.

I fail to see how Judge Kennedy's past club affiliations disqualify him from membership on the U.S. Supreme Court. He has done the honorable thing with respect to each of them. He fought for internal change and when

he realized that he would not succeed he resigned. It is simply not true that he made no objection to discriminatory club policies until a giant sugar plum danced before his eyes. His objections are long standing and his resignations commenced in 1980. Let me ask you a rhetorical question. How many White males in your acquaintance objected to discriminatory clubs prior to 1980 and sought to change them as Judge Kennedy did? I am not unmindful of the chorus of voices castigating Judge Kennedy for waiting so long before he resigned from some of these clubs. To those people I reply with a statement attributed to Justice Frankfurter.

> "All too often, wisdom never comes. For this reason, no one should reject it merely because it's late".

I urge you to evaluate Judge Kennedy on his whole record, and when this is done there is no doubt in my mind that you will reach the conclusion that he deserves this promotion to the major leagues. Turning him down because some of us assert that he made an incorrect decision on an isolated case here and there would be like banishing Willie Mays to the minor leagues because he once dropped a fly ball, or benching Mickie Mantle because he struck out now and then. Perhaps a more recent analogy could be offered by saying Judge Kennedy's rejection would be like cutting Jerry Rice because he tends to drop three out of every 400 passes, or like firing Montana because last week he failed to complete the 24th consecutive pass he threw.

Very little comment has been made concerning the case of Flores vs. Pierce, 1617 F.2d 1386 (1980) in which Judge Kennedy wrote the opinion affirming a judgment against certain public officials in Calistoga, California who objected to a Mexican-American entreprenuer securing a wine and beer license in that city. Judge Kennedy held that the disparate impact the action had upon Mexican-Americans was some evidence of the requisite intent to discriminate. He also expressly adhered to the rule announced in the case of Columbus Bd. of Education vs. Penick, 433 U.S. 449, at P. 464 where it was held that:

> "Adherence to a particular policy or practice with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn".

These cases lead me to believe that Judge Kennedy has a full grasp of the inherently elusive nature of segregative intent, and views the total picture so as to enable him to flush out racism wherever it raises its ugly head.

My relationship with Judge Kennedy has, with one exception, been very good. Both of us are frustrated law professors at heart, so we teach one course per week at the University of The Pacific, McGeorge Law School in Sacramento. He taught constitutional law, and I teach jurisprudence. Since both subjects embrace constitutional theory, our lectures at times overlap. It is a well known fact that at the end of some of his lectures his students stand, applaud and cheer. I confess my jealousy. All I get at the end of my lectures is an occasional sigh of relief that it is over. It is sincerely hoped that when Judge Kennedy moves to Washington, D.C., the students will feel inclined to cheer me once in a while.

One of my friends in the civil rights movement questioned the wisdom of my appearance here. He said that not enough is known about Judge Kennedy's views on civil rights issues. My reply was that I know enough about Judge Kennedy as a fair and honest person, and as a brilliant scholar and judge to enable me to come before you with confidence that to evade this opportunity would constitute an act of partisan cowardice for which I would be ashamed for the balance of my life. If I ever harbored any doubts about Judge Kennedy, which I have not, they would have been erased by the response he gave to another judge at a judges conference where Brown vs. The School Board was discussed. This is what Judge Kennedy said of Brown vs. The School Board:

> "I do not skirt around it. I embrace it. All of us reject the narrow originalist construction that you are advancing and attributing to us. Plessy vs. Ferguson was wrong when it was decided. Justice Harlan dissented at the time and he was correct. The only thing wrong with Brown is that it wasn't decided 80 years earlier".

Most Black people in America view the decision in Brown as our Magna Carta. It was to us a second and perhaps a more meaningful Emancipation Proclamation. It forced America to commence the long and painful process of reconciling its practices with its high sounding theories. Without Brown, America would be considered not much more than a giant joke when it attempts to lecture the rest of the world about protection of human rights.

I close with a heart-felt willingness to return Judge Kennedy's embrace of Brown with a fond symbolic embrace of him. I urge this Committee to do likewise.

Thank you.

NATHANIEL S. COLLEY, SR.

NATHANIEL S. COLLEY, SR.
Sacramento, California, 1987

EDUCATION BACKGROUND

1. B.S. Degree, Tuskegee Institute, 1941 in Secondary Education with high honors.

2. J.D. Degree, Yale University Law School, 1948; won C. LaRue Munsun Prize for most significant contribution of any Yale student to New Haven, Connecticut Legal Aid Society. Shared Benjamin Sharp Prize for best original essay of any Yale law student in 1948.

PROFESSIONAL EXPERIENCE

1. Private practice of law January 1949 to date. Senior Partner COLLEY, LINDSEY and COLLEY, 1810 "S" Street, Sacramento, California.

2. Part-time Professor of Law, University of the Pacific, McGeorge College of Law, 1971 to date.

3. Lecturer, Continuing Education of Bar, University of California Extension Service.

4. Lecturer, California Trial Lawyers Association Seminars, since 1965.

5. Western Regional Counsel, NAACP; member, National Legal Committee, NAACP.

PROFESSIONAL ASSOCIATIONS

1. American Bar Association.

2. California State Bar Association.

3. Sacramento County Bar Association.

4. American Trial Lawyers Association.

5. California Trial Lawyers Association.

6. American Board of Trial Advocates.

CIVIC AND EDUCATION BOARD MEMBERSHIPS

1. National Board of Directors, NAACP, 1961 to date.

2. National Board of Directors, National Committee Against Discrimination in Housing, 1967 to 1968.

3. Board of Trustees, Tuskegee University 1966 to date.

4. Member, California State Board of Education, 1960 to 1964.

5. Executive Committee, Yale Law School Association, 1981-1982.

6. Member, Board of Directors, Charles F. Kettering Foundation, Dayton, Ohio, 1973 to date.

7. Former Board Member of Travelers Aid, United Crusade and Lincoln Christian Centers, Sacramento, California.

8. Former President, California Federation for Civic Unity.

9. Member, Board of Directors, California Journal, 1975 to 1978.

10. Chairman, California Horseracing Board, 1976-1983.

11. Member, California Judicial Council, 1978-1980.

12. Chairman, Board of Trustees, NAACP Special Contribution Fund.

POLITICAL

1. Former member, President's Committee on Discrimination in the U.S. Armed Forces, 1961 to 1962.

2. Former member, California State Democratic Central Committee.

3. Former member, Sacramento County Democratic Central Committee.

4. Northern California Chairman, Humphrey for President, 1972.

MILITARY

1. Entered in U.S. Army, 1942 as private.

2. Discharged 1946 with rank of Captain.

3. Philippine Liberation Ribbon.

PUBLICATIONS

1. "The California and Washington Housing Cases", Law in Transition, 1962.

2. "Civil Actions for Damages In Civil Right Cases", Hastings (University of California, San Francisco, California) Law Journal.

3. "Tort Law In The Year 2000", California Trial Lawyers Journal, 1970.

4. "Injury Without Impact In FELA Cases", 1968 Seminars, California Trial Lawyers Association.

5. "Extraordinary Writs In Criminal Law Practice", 1968 Seminars, California Trial Lawyers Association.

6. "The NAACP - Agitation or Advancement", Torch Magazine.

7. "New Dimensions of Negro Political Thought", The New Democrat, 1964.

HONORS

1. Who's Who In The West.

2. Who's Who In America.

3. Who's Who In The World.

4. Sacramento's Man Of The Year, 1981.

5. William R. Ming, Advocacy Award, NAACP.

6. National Medical Association's National Citizenship Award.

7. National Bar Association's Equal Justice Award.

8. California Association of Black Lawyers Loren Miller Award.

FAMILY

1. Married to Jerlean J. Jackson. Five children, Jerlean E. Daniel, Ph.D.; Ola Marie Brown; Attorney Natalie S. Lindsey; Sondra A. Colley; and Attorney Nathaniel S. Colley, Jr.

The CHAIRMAN. Last but not least is Ms. Kepley.

Ms. KEPLEY. Thank you, Senator Biden. I am here on behalf of Beverly LaHaye, president of Concerned Women for America. She was scheduled to testify tomorrow, but was called out of the country and could not make it back today for the testimony.

And so with your permission, I will read her testimony for you, for the record.

The CHAIRMAN. Good.

Ms. KEPLEY. Mr. Chairman, members of the committee, the women I represent are concerned about a wide range of issues and problems. Concerned Women for America has become the vehicle through which 500,000 women nationwide voice their opinions and seek solutions to the problems which affect the future of American men, women, and families.

CWA admires the legal approach Judge Kennedy has taken when faced with these issues, and we appreciate the opportunity to speak in favor of his nomination to the U.S. Supreme Court.

Our first area of concern today is crime. Criminals frequently victimize women, the poor, and the elderly. Unfortunately, in many cities across this great land, females and senior citizens often live in fear, afraid to even venture outside of their homes alone because of crime in the streets. And unfortunately, our modern-day society is one in which criminals often go free while the innocent victim is put on trial.

But fortunately for all Americans, there are judges like Anthony Kennedy, who are committed to curtailing crime in our country as well as insuring constitutional safeguards for the accused.

Judge Kennedy is one of the legal minds who have been able to strike the delicate balance between protecting the rights of the victim and the rights of the accused. He has supported police who make searches in good faith, but he has also voted to exclude illegally gathered evidence in criminal trials.

He has supported State imposition of capital punishment on murderers, and long before it became popular to take a strong stance against substance abuse, Judge Kennedy recognized the threat of illegal drugs to our country, and ruled in favor of international efforts to curtail drug traffickers.

These and other decisions indicate that Judge Kennedy strives to protect both the constitutional rights and the lives and property of America's citizens. His balanced approach is something that Americans of all ages, both sexes, and any race can enthusiastically support.

Our second area of concerns is the protection of the freedom of speech and of the press. Concerned Women for America understands that healthy political change comes when debate is open and secure, free from government censorship. When the courts vigilantly guard these precious first amendment rights, all Americans can freely advocate and work for social change.

Judge Kennedy has shown an outstanding commitment to protecting our free speech. He has struck down pre-broadcast censorship. He has ordered sealed court documents to be opened to the public and pressed for review. His judicial record boldly demonstrates his strong support for the sterling freedoms of the press room that are a vital component of any democracy.

The third area of concern which I wish to address today falls in the economic arena. Our free-enterprise system and open-market concepts have made America thrive unlike any other nation on the face of the Earth. These principals offer every American the opportunity to better their lives, to provide for their families, and to strive to become financially secure.

Our nation's businesses and companies, both large and small, have flourished because they have been free to operate according to the dictates of an open marketplace. It is vital to our nation's future that these basic, timeless concepts remain firmly intact.

Judge Kennedy's decision in the Washington comparable worth case has protected these irreplaceable and valuable forces. His decision has allowed the economy of the State of Washington to continue to operate under the natural laws of supply and demand, free from unnatural and destructive dictates which would have been endangered the fibers of the economic foundation of this country.

The absurd economic theory known as comparable worth, rejected by Judge Kennedy and Concerned Women for America, mandated that greatly varying jobs should be quantified and compared, and wages set and regulated by a court, not the marketplace.

Judge Kennedy's refusal to conform to the interests of the pressure groups posing this theory is an excellent example of his deeply held belief that judges should not make laws, but rather should interpret laws made by the people through their elected officials.

If he had accepted the comparable-worth argument, his decision would have placed enough power in the hands of the courts to affect the entire economic structure of the State of Washington, crippling the marketplace forces of supply and demand, union contracts, and competition, just to name a few.

Concerned Women for America strongly supports equal pay for equal work, and we strongly oppose the concept of comparable worth. Arbitrary, subjective evaluations of disparate jobs would be detrimental to the people of any economy.

Judge Kennedy ruled, quote, "Neither law nor logic deems the free-market system a suspect enterprise. We find nothing in the language of title VII or its legislative history to indicate Congress intended to abrogate fundamental principles," unquote.

In summary, Judge Kennedy's decisions reflect a deep respect for the values which will continue to make the United States of America unique and sovereign—safer neighborhoods, the protection of individual rights, the preservation of our freedom of speech and of the press, and our ability to strive for the American dream, free from undue government intervention.

Concerned Women for America urges the Senate to confirm Judge Anthony Kennedy, a judge for the future of America, to the U.S. Supreme Court.

Thank you very much.

[The statement of Beverly LaHaye follows:]

TESTIMONY OF CONCERNED WOMEN FOR AMERICA

presented by

BEVERLY LAHAYE, PRESIDENT

Concerned Women for America
122 C Street, NW, Suite 800
Washington, D.C. 20001

Before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

December 16, 1987

TESTIMONY OF BEVERLY LAHAYE
PRESIDENT, CONCERNED WOMEN FOR AMERICA

Mr. Chairman, members of the Committee, the women I represent are concerned about a wide range of issues and problems. Concerned Women for America has become a catalyst through which over 500,000 women nationwide voice their opinions and seek solutions to the problems which affect the future of American men, women, and families. CWA admires the legal approach Judge Kennedy has taken when faced with these issues, and we appreciate the opportunity to speak in favor of his nomination to the United States Supreme Court.

Our first area of concern today is crime. Criminals frequently victimize women, the poor, and the elderly. Unfortunately, in many cities across this great land, females and senior citizens often live in fear, afraid to even venture outside of their homes alone because of crime on the streets. And, unfortunately, our modern day society is one in which criminals often go free, while the innocent victim is put on trial. But, fortunately for all Americans, there are judges like Anthony Kennedy who are committed to curtailing crime in our country, as well as ensuring constitutional safeguards for the accused.

Judge Kennedy is one of the legal minds who has been able to strike the delicate balance between protecting the rights of the victim and the rights of the accused. He has supported police who make searches in good faith, but he has also voted to exclude

illegally gathered evidence in criminal trials. He has supported state imposition of capital punishment on murderers. And, long before it became popular to take a strong stance against substance abuse, Judge Kennedy recognized the threat of illegal drugs to our country and ruled in favor of international efforts to curtail drug traffickers. These, and other decisions, indicate that Judge Kennedy strives to protect both the constitutional rights, and the lives and property of America's citizens. His balanced approach is something that Americans of all ages, both sexes, and any race can enthusiastically support.

Our second area of concern is the protection of the freedom of speech and of the press. Concerned Women for America understands that healthy political change comes when debate is open and secure, free from government censorship. When the courts vigilantly guard these precious first amendment rights, all Americans can freely advocate and work for social change.

Judge Kennedy has shown an outstanding commitment to protecting our free speech. He has struck down pre-broadcast censorship. He has ordered sealed court documents to be opened to the public and press for review. His judicial record boldly demonstrates his strong support for the sterling freedoms of expression that are a vital component of any democracy.

The third area of concern which I wish to address today falls in the economic arena. Our free enterprise system and open market concepts have made America thrive unlike any other nation

on the face of the earth. These principles offer every American the opportunity to better their lives, to provide for their families, and strive to become financially secure. Our nation's businesses and companies, both large and small, have flourished because they have been free to operate according to the dictates of our open marketplace. It is vital to our nation's future that these basic, timeless concepts remain firmly intact. Judge Kennedy's decision in the Washington comparable worth case has protected these irreplaceable and valuable forces. His decision has allowed the economy of the state of Washington to continue to operate under the natural laws of supply and demand, free from unnatural and destructive dictates which would have endangered the very fibers of the economic foundation of this country.

The absurd economic theory known as comparable worth rejected by Judge Kennedy, and CWA, mandated that greatly varying jobs should be quantified and compared, and wages set and regulated, by a court, not the marketplace. Judge Kennedy's refusal to conform to the interests of the pressure groups posing this theory is an excellent example of his deeply held belief that judges should not make laws, but rather, should interpret laws made by the people through their elected officials. If he had accepted the comparable worth argument, his decision would have placed enough power in the hands of the courts to affect the entire economic structure of the state of Washington, crippling the marketplace forces of supply and demand, union contracts, and

competition, just to name a few.

Concerned Women for America strongly supports equal pay for equal work, and we strongly oppose the concept of "comparable worth". Arbitrary, subjective evaluations of disparate jobs would be detrimental to the people of any economy. Judge Kennedy ruled, "Neither law nor logic deems the free market system a suspect enterprise... We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles..."

In summary, Judge Kennedy's decisions reflect a deep respect for the values which will continue to make the United states of America unique and sovereign - safer neighborhoods, the protection of individual rights, the preservation of our freedom of speech and of the press, and our ability to strive for the American dream free from undue government intervention.

Concerned Women for America urges the Senate to confirm Judge Anthony Kennedy, a judge for the future of America, to the United States Supreme Court.

The CHAIRMAN. Thank you very much. I am going to limit my 5 minutes, quite frankly, to Mr. Colley, not because the others aren't important, but because, quite frankly, I know of your deep commitment. And not that others aren't committed, but I know personally of your deep commitment to the issues that quite frankly trouble me most about Judge Kennedy.

And that is why. It is out of no disrespect to the rest of the members.

I listened to you make a speech once when you were aware of my presence, I suspect, and once when you were not, about civil rights and civil liberties. And so if you mean what you say, and I know your background and record indicate you do, it is some of consequence to me that you would be supporting Judge Kennedy.

Most civil-rights organizations, and I believe you were—weren't you at one time on the Board of NAACP?

Mr. COLLEY. For as long as time goes back, almost, for over 20 years. And I still am.

The CHAIRMAN. Most civil-rights groups have either abstained from taking a position, not because they are reluctant to take a position, but because they are uncertain, as I read it, or some few have come out against—not the NAACP—but have come out against the Judge.

Some of his decisions are hard for me to reconcile with some of the rhetoric which he uses in his speeches—not that there are that many speeches, but in his speeches about the spacious phrases.

And it is clear from everything we have found in our investigation, your testimony, and his that he has fully, fervently, and completely embrace *Brown* and all that it stands for, *Brown* v. *the Board.*

But it is less clear to me that he is, for lack of a better word, sensitive to some of the more sophisticated means by which discrimination is undertaken, not only against blacks, but against browns, against women, against minorities.

Just use the remainder of my time, the next 3 or 4 minutes, to tell me about, if you can, what he is like in Sacramento, and whether or not—as Joe Rauh said, ask somebody who knows him where he was at the time of some of the monumental decisions, where his thinking was.

I am not suggesting you are with him all the time, but talk to me a little bit about why you have sense of confidence about him.

Mr. COLLEY. My sense of confidence does not arise from what he said when the Court made certain decisions. My sense of confidence arises because I know him very well. I know him to be a very fair man, a man who wishes the best for America and all of its groups, no matter what color, creed or otherwise.

I would say to you that Judge Kennedy has never done or said anything that I know of which would indicate that he harbors any kind of racial or ethnic bias.

The CHAIRMAN. If I can interrupt you, I don't think anybody has ever indicated that. The concern that—let me speak of my concern.

The concern that I have is that, like many prominent, honorable, decent, and intelligent members of, for lack of a better word, the establishment in various communities are never reluctant to remedy an injustice toward an individual, but many times, either

out of lack of wanting to take on the establishment or lack of appreciation for the depth of the problem, seem reluctant to deal with systemic problems.

Mr. COLLEY. All right. I think that is a fair statement, and what you described just now was the average American white male. The world was yours, and you were apathetic. The world was yours, and you didn't want to shoot anybody; you didn't want to lynch anybody. But you weren't concerned about all the subtleties we are concerned about now.

We have to give Judge Kennedy credit for, as early as 1980, beginning to reminisce about these clubs, for instance, which discriminate, and trying to change them, actually affirmatively trying to change them.

And in some instances where he thought change would not come, his only remedy was to withdraw. And I am not talking about 1987 withdrawals; I am talking about as early as 1980.

I also know from personal experience that he was uncomfortable in any situation where he thought discrimination might exist, but he was as not as sensitive earlier on as he should have been.

But as I said before, if you apply that as a test, not many of us escape.

The CHAIRMAN. Let me ask you, since my time is up, one concluding question. You know Judge Kennedy; you have known him for some time. Is he the kind of man that, after having gone through this process, in your opinion, will at least spend some time contemplating what was said about him?

Will he have listened to what I thought was just quite frankly a very, very articulate testimony by Ms. Hernandez? Is that the kind of the thing he listens to?

Mr. COLLEY. I would tell you that Judge Kennedy is a grown man, but he is a growing man. And I have no doubt that as he proceeds through life, he now knows how important it is to be more sensitive to the issues that now worry you.

I would predict that as he grows, your satisfaction with him will grow also.

The CHAIRMAN. Well, as you pointed out, or someone pointed out, earlier, I have no right to insist that a Supreme Court nominee agree with everything, or even a majority of the positions I would take, specific positions.

But it seems to me that we all have a right to insist that certain basic principles which we feel deeply about will be reflected. And I——

Mr. COLLEY. I know the time is gone, but could I just speak briefly about a couple of cases that he has dealt with, and which he has criticized for?

One is the *Spangler* case in Pasadena. All he did in that case was rule that the people who were making the motion to have the school board abolish the fundamental school were not parties to the action. And he said to them, "You will have to make a motion to intervene in order to get the court to do something, and you have not made a motion to intervene. You have not made a motion to be joined as plaintiffs, so you are strangers, really."

I don't see how a court can operate its business if it listens to people who refuse to intervene and refuse to be joined as parties,

yet dictate the outcomes of litigation. So I don't think there is anything unusual about that, and I am well aware of the situation in Pasadena.

Now, with reference to *TOPIC* v. *Circle Realty,* that was a narrowly decided case. I don't guess there is anything wrong in telling you that I talked with Judge Kennedy about that case, because he knew of my concerns about discrimination in housing.

His explanation to me was that he certainly harbored no animosity toward anybody, but he honestly thought that the section of the law which that case was brought under did not allow parties who were not discriminated against—community groups such as this—to bring an action directly in court.

He felt that the law required them to go through the administrative process, and he felt that the administrative process was really in many ways far superior to the long, drawn-out court actions.

So there was nothing in that case which expressed any view of race and housing so far as minorities are concerned.

The CHAIRMAN. I thank you, and I thank my colleagues for allowing me to go over a little bit of my time. The Senator from South Carolina.

Senator THURMOND. Thank you very much, Mr. Chairman. First, I want to express my appreciation to the witnesses who came here today to testify in behalf of Judge Kennedy.

Now, as I understand, Mr. Cartwright, you know Judge Kennedy personally.

Mr. CARTWRIGHT. Yes.

Senator THURMOND. How long have you known him?

Mr. CARTWRIGHT. Oh, 15 or 20 years.

Senator THURMOND. Mr. Colley, how long have you known him?

Mr. COLLEY. About the same time.

Senator THURMOND. Mr. Plant, how long have you known him?

Mr. PLANT. About 25 years.

Senator THURMOND. Now, Ms. Kuhl, do you know him personally?

Ms. KUHL. I do, Senator Thurmond. I have known him about 10 years. I was——

Senator THURMOND. Are you from Sacramento?

Ms. KUHL. I was his law clerk in 1977.

Senator THURMOND. A law clerk. Ms. Kepley, do you know him?

Ms. KEPLEY. I have not had the privilege of knowing——

Senator THURMOND. I can't hear you.

Ms. KEPLEY. I have not had the privilege of meeting Judge Kennedy as of yet.

Senator THURMOND. So four of you have known him personally, and you know him through reputation, do you, Ms. Kepley?

Ms. KEPLEY. Yes, sir.

Senator THURMOND. You have studied his cases and his records, speeches, and so forth?

Ms. KEPLEY. Yes, sir.

Senator THURMOND. Now, from your personal knowledge of Judge Kennedy, and the knowledge Ms. Kepley has obtained from studying his record, speeches, decisions, and so forth, I want to ask you this question.

The American Bar has said that they consider three qualities in determining whether a judge to the Supreme Court is qualified—integrity, judicial temperament, and professional competence.

I want to ask you a simple question, and I wish you to answer yes or no. I don't think you need to go explaining because it explains itself. Do you feel that Judge Kennedy—and I will start with you right on this end—do you feel he is qualified by those qualities to be a member of the Supreme Courts of the United States.

Mr. CARTWRIGHT. I do, Mr. Thurmond.

Mr. COLLEY. I believe he is exceptionally well qualified by that standard and additional standards as well.

Mr. PLANT. I resoundingly feel that he is extremely well qualified.

Ms. KUHL. Judge Kennedy is extremely well qualified by the ABA's criteria or any other criteria.

Ms. KEPLEY. Absolutely. Yes, sir.

Senator THURMOND. I want to ask you this question. Do you know of any reason why he should not be confirmed by this committee and the Senate? Is there anything of a particular nature that is not covered by those three qualities that the ABA considers? Do you know of any reason whatsoever why he should not be confirmed? Is there anything in his personal life or anything in his career history, or any other reason? Do you know of any reason why he should not be confirmed?

Mr. CARTWRIGHT. I don't know of anything.

Mr. COLLEY. Not at all. I have never heard anybody in Sacramento utter a bad word about him.

Mr. PLANT. And I previously testified to the same effect.

Ms. KUHL. I know of no reason he should not be confirmed, Senator Thurmond.

Ms. KEPLEY. I know of no reason why he should not be confirmed.

Senator THURMOND. Now, Mr. Colley, I want to say that Congressman Matsui testified here, and he told us to listen especially to your testimony. He said you knew him so well, and I guess he wanted to explain certain portions of his testimony and to be substantiated by your positions.

Mr. COLLEY. When an unknown comes before you, somebody has to go ahead and warn you that somebody is coming, and describe that person.

When you come to the President of the United States, they just say, "Ladies and gentlemen, the President of the United States." If a country lawyer from Sacramento comes, you need a big press release, a Congressman to tell how great you are, and all the rest.

Senator THURMOND. Well, I want to commend you, too. I know you have had to overcome a lot of obstacles to get where you are today, and I just want to commend you for what you have done, what you have accomplished.

Mr. COLLEY. Thank you.

Senator THURMOND. Now, Ms. Kepley, I believe you represent an organization, Concerned Women for America.

Ms. KEPLEY. Yes, sir.

Senator THURMOND. That is the same organization, I believe, of which Ms. Beverly LaHaye is the president?

Ms. KEPLEY. Yes, sir, that is correct.

Senator THURMOND. She has testified here in the hearing for Judge Bork.

Ms. KEPLEY. Yes, sir.

Senator THURMOND. She made a very fine impression. One of the finest witnesses that we have had come before us.

Ms. KEPLEY. Thank you for your very kind words.

Senator THURMOND. And from her testimony, I gained good respect for that organization. I just want to tell you that.

Ms. KEPLEY. Thank you very much.

Senator THURMOND. Again, I want to thank you all for coming, taking your time, and testifying. I think you have taken the right side. I agree with you.

Thank you very much.

The CHAIRMAN. Before you dismiss them all, Senator, the Senator from Ohio.

Senator METZENBAUM. Ms. Kepley, I don't want to question you about the substance of your testimony, nor about your position, but I've sat through a number of hearings in which I've heard about Concerned Women for America.

There are eleven million people in Ohio, and I've looked around for Concerned Women for America in Ohio, and can't find any, and I know that you always talk about the organization being a catalyst through which over 500,000 women nationwide voice their opinions, and seek solutions to the problems which affect the future of American men, women and families.

Now, I think Ms. LaHaye says you don't have 500,000 members, but that that number has to do with women who have written in or something.

Tell me exactly where you get that 500,000 figure.

Ms. KEPLEY. I will be happy to clarify that for you, sir, and furthermore, we do have membership in Ohio, and I'm sure that——

The CHAIRMAN. They'll come and visit you shortly.

Ms. KEPLEY [continuing]. We'll have some people come and visit you very shortly, that's right.

Senator METZENBAUM. That's fine. I haven't heard from them yet. I'll be glad to hear from them.

Ms. KEPLEY. We would be happy to do that, Senator Metzenbaum.

Senator METZENBAUM. I'll be glad to do that. How many members do you have in the country?

Ms. KEPLEY. We have over half a million members.

Senator METZENBAUM. And how do you become a member? Do you pay dues?

Ms. KEPLEY. I would be happy to clarify that for you. Our membership is composed of people who have either supported us actively on the grassroots level, or they have supported us financially, or both.

Quite frankly, Senator, we have members who are senior citizens who are on Social Security, and they cannot afford to donate financially, and so we give them complimentary memberships.

So we have those who are both active on the grassroots level, or those who financially support us, or both.

Senator METZENBAUM. Yes, but that doesn't answer my question. How many dues paying members do you have?

Ms. KEPLEY. I think I just explained our membership.

Senator METZENBAUM. You explained it, but you didn't tell me how many dues paying members you have.

Ms. KEPLEY. We do not have a dues paying membership. We have those who financially support us through donations, and we have those who are active on our grassroots level, and have supported us actively in that realm, or both.

Senator METZENBAUM. Well, since you're a group that consistently comes before Congress on right-wing issues, tell me what kind of contributions do you get? Do you get large contributions from some people who support your philosophy?

I'm trying to get to the bottom of your claim. When somebody comes to the Congress and says, we represent or speak for 500,000 people, which I've heard Ms. LaHaye say before, I want to know what that means.

And I think you have a budget of $4,000,000, and a staff of 22 people. Now where does the money come from if you don't have dues?

Ms. KEPLEY. Well, I think I explained that. Perhaps I can clarify it a little bit better. I am not privy to the financial records in our organization.

However, we do have those individuals who are supportive of our organization who financially support us, and donate funds. We do not have dues.

Senator METZENBAUM. Then are your financial records open? Are they public, or is it just a private group?

In other words, does one person give you $4,000,000? Do two people? Do ten people? And do you just claim that you're speaking for 500,000 people?

That's what really concerns me, because that's such an overwhelming number, as compared to almost any other group that comes before the Congress. I really think we're entitled to know what it means to say that your group is speaking for 500,000 people?

Ms. KEPLEY. Well, Senator, we don't have one person or two people who are donating $4,000,000 to us every year. However, we would, of course, welcome that donation, but, as I said before, we have individuals who financially donate to our organization, and we have those who are active on the grassroots level, or both.

And I would be happy to have our controller contact you regarding this issue.

Senator METZENBAUM. Would you have him do that? I'd like to see your financial reports, because I think it is a matter of concern to us.

Ms. KEPLEY. I cannot promise to you that—I do not know the status of our financial reports, as far as if you would be privy to them, but I would be happy to have our financial officer contact you with any other further questions that you might have.

Senator METZENBAUM. Well, I wanted to say that each time that Concerned Women for America come before us, I am going to press this question, because I'm overwhelmed by the 500,000 figure, and frankly, I question whether you really are, indeed, speaking for

that many people, and I think we are entitled to have some further evidence or documentation.

When the AFL/CIO comes, we ask them how many members; when NOW comes, when the NAACP comes, when any one of a host of other organizations comes, whether it's the NAM or the US Chamber, we get some idea of actual membership.

In this case, I don't know whether it's a figment of the imagination of people who have written in at one time or another, or whether there really is some substance to the claim.

And so I would appreciate your passing on to the powers that be in your organization that this Senator, at least, would like to know before the next appearance, and hopefully through your comptroller, what the basic facts are with respect to this organization.

The CHAIRMAN. Thank you, Senator. I don't think that the point is at all irrelevant. As a matter of fact, earlier today we had one witness stand before us and tell us that he was speaking for 22 million Americans, and I'm not being facetious when I say this.

It was a gay and lesbian rights organization that claims to speak for 22 million. They may very well, but that particular organization does not have 22 million people who in fact are members.

I asked how they arrived at that number, and it was pointed out to me that statistics indicate that ten percent of the population is gay or lesbian, and therefore they spoke for them.

I think it's presumptuous for that organization to speak for anyone that is not their member, and it would obviously be presumptuous of this organization to claim to speak for 500,000 people; but I'm sure they will give us the facts at one point.

Senator METZENBAUM. May I just make one observation to Mr. Colley, please? It will be very brief.

The CHAIRMAN. Oh, sure.

Senator METZENBAUM. I just want to say, Mr. Colley, that you must be a good lawyer, and must be a very able person, because you've got a wonderful sense of humor, as to how you happened to choose the college that you attended.

I very much enjoyed reading in your statement, "In those days Stanford did not welcome blacks, Columbia had a quota system, Harvard was too far from Harlem, so I went to Yale."

Your decision to go to Yale is a big compliment to that college.

The CHAIRMAN. Mr. Colley, if we had time I would love you to tell the nation that's watching, because I think it's both humorous and also almost pathetic, the story you tell about when you headed the Racing Commission, and a very distinguished woman asked you what capacity you——

As a matter of fact, I'll ask you, unless you think it's inappropriate.

Mr. COLLEY. Well, I have no objection. I tell everywhere I go, if anybody will listen.

And the purpose of it is, to illustrate how presumptions are against you when you are in a minority——

The CHAIRMAN. That's the reason I'd like you to tell it.

Mr. COLLEY. I was chairman of the California Horse Racing Board, and was invited to Washington to address, in the Capitol Hilton Hotel, the American Horse Council, made up of all the

horse people. You know, the Vanderbilts, the Whitneys and everybody.

I was the only black person in the room, not only the only one on the platform, but the only one in the room.

The CHAIRMAN. And you were president of this organization?

Mr. COLLEY. No, I was chairman of the California Horse Racing Board, and I was the keynote speaker.

The CHAIRMAN. Oh, California——

Mr. COLLEY. And this lady sitting next to me kept looking at me uncomfortably. And she kept looking, and I thought she was really flirting with me, but I overestimated myself.

And finally she blurted out to me, "For whom do you groom?"

She presumed that I must be a groom who cleaned the stalls, and I told her that sometimes for my wife a little bit, and sometimes for myself—I have a horse or two.

And then when I was introduced to speak, and I spoke on the issues before the convention, and I looked back, she'd fled. I never saw her again, because that seat stayed empty when I got back to it.

The CHAIRMAN. Well, thank you for relating that story.

Senator THURMOND. Mr. Chairman, I just want to suggest to the able Senator from Ohio he might want to look into the NOW organization, since you were looking at these organizations.

Senator METZENBAUM. I don't have any problem about doing that. As a matter of fact, I think they do give us some facts and figures as to how many members they have.

I think that when people come before us and say, we speak for so many people, that we have a right to ask them to give us some back-up, whether it's NOW or whether it's Concerned Women for America, or whether it's the XYZ group.

Senator THURMOND. I just wanted to be sure you didn't single out this particular organization.

Senator METZENBAUM. I really wasn't. But I've heard this 500,000 figure so many times before that I've become a little bit sensitive about it, and just thought that perhaps the message could be taken back that one of the members of the Senate would like to know the back-up facts.

The CHAIRMAN. Senator, before you speak, how many people do you represent?

Senator SPECTER. I represent 12 million Pennsylvanians.

The CHAIRMAN. All right. Well, you're entitled to speak then.

Senator SPECTER. Ms. Kuhl, there has been considerable concern expressed about Judge Kennedy's sensitivity to women.

You were a law clerk for Judge Kennedy. Can you be explicit and tell us what evidence you have, from your personal observations, if any, about Judge Kennedy's sensitivity to women's rights and women's issues?

Ms. KUHL. I was Judge Kennedy's first female law clerk. That was in only his third year on the bench.

One of the things that has always been quite wonderful about clerking for Judge Kennedy, and I think remains so, is something that Wendy Collins Perdue mentioned, and that is that a law clerk for Judge Kennedy is treated like a colleague.

Certainly the Judge does his own work, and writes his own opinions, but he enjoys very much discussing his work with his law clerks.

This was immediately true for me, just as it was true for my male co-clerk, and for any of the other male clerks who have worked with Judge Kennedy.

I never found Judge Kennedy to make any distinction on account of sex, and moreover, I have valued Judge Kennedy's colleagueship, if I may presume to say so, so much that I have, throughout my career at various points, sought his advice and counsel, which I value greatly, about my own career.

He has been very helpful to me in giving of his time, and I feel very close to his family, as does my husband; and in all respects Judge Kennedy has been a great——

Senator SPECTER. But you think he's sensitive to women's issues, based on your experience with him?

Ms. KUHL. Certainly based on his treatment of me, I know of no reason to think that he would not be sensitive to women's issues, and certainly can assure you that he treats women the same as he treats men.

Senator SPECTER. Mr. Colley, I, too, was very much interested in your reasons for choosing your law school. When you commented about Stanford not welcoming blacks, and Columbia having a quota system, and Harvard was too far from Harlem.

But my experience suggests that there were some good reasons, otherwise, for your going to the Yale Law School.

I enjoyed reading your statement. I noted your allergies; I recall having some myself, but I very much appreciated your comment about, you can come from anywhere and go anywhere if you really try.

I started off in Kansas and got to the Yale Law School, and I think that those words of yours are very important, aside from the context of Judge Kennedy's confirmation proceedings.

The CHAIRMAN. He eventually ended up in Philadelphia.

Mr. COLLEY. He has a presumption that he has a superb education.

Senator SPECTER. Well, there are a lot of good things to recommend the Yale Law School besides the process of elimination.

Mr. COLLEY. Had I had any doubts about Yale I never would have made that kind of remark, but its reputation is such that we can joke a little about it.

Senator SPECTER. Well, I'm sure of that.

Mr. Colley, the question that I have for you turns on your evaluation—and you've already testified about it—as to Judge Kennedy's sensitivity to civil rights.

I have read your statement, and it is all the more credible when you take *Aranda* and say that he made a mistake there, and you thought that it should have been decided differently, not on motion for summary judgement.

You make reference to *Flores* v. *Pierce*, which I had commented on, which is favorable on civil rights.

I would refer back to the *Pasadena School Board* case, and the case that you have cited is the 1977 decision by the ninth circuit, and I had questioned Judge Kennedy earlier about a 1979 decision

of the circuit on the same case, because it was in the circuit on a number of occasions—even got to the Supreme Court of the United States.

And the concern that I had about his decision in the *Pasadena School Board* case turned on his overruling, or disregarding, the findings of fact of the district court, and I had read him one finding in the memorandum opinion of the court, and I would like you to comment about that.

And it is this: The trial judge said, "A majority of the defendants have acted with unyielding zeal and overt antipathy to the desegregated concept of the Pasadena plan. Promising return to neighborhood schools with the recognition that it cannot be accomplished without resegregation of Pasadena schools is bad faith, not only to the principles of constitutional duty, but also to their own constituency."

And knowing the *Pasadena* case as you do, and knowing Judge Kennedy as you do, and being the lawyer that you are, in terms of fact finding, and the district judge, and the appellate scope of review, I'd be interested in your observations on this issue

Mr. COLLEY. I think that decision, overruling the findings of the trial judge, was an incorrect decision. I think that the decision did not show sufficient sensitivity to the real problems, and I think what really happened there, the court just was tired of that *Pasadena* case, because it had been in the courts so long.

And all of the pupils who were there when the case was filed had long since graduated, and they simply felt it was time to turn it back over to the school board.

But since the school board had not carried out the mandate, and since the problem still existed, the district court should have kept jurisdiction and they should have compelled compliance.

Senator SPECTER. Well, I appreciate that answer. That kind of direct disagreement, I think, underscores your credibility generally, and I appreciate your comment.

Thank you very much.

The CHAIRMAN. The Senator from Alabama.

Senator HEFLIN. Mr. Colley, I think the members of this panel ought to know that since you went to Yale to law school, where did you go to undergraduate school?

Mr. COLLEY. Well, I stated in the beginning, I went to Tuskegee on a 5-year work plan because I didn't have any money to go there in 4 years, so I worked my way through.

I made up for it when I went to Yale, because I graduated in 2 years instead of 3, because I was so smart. It took 5 years because I was so poor, and I made it up later on in 2 years because I was so smart.

Senator HELFIN. Well, we are delighted to see this group here, and the hour is getting late, but we appreciate your testimony of each and every one of you.

Senator METZENBAUM. Mr. Chairman?

The CHAIRMAN. Right. The Senator from Ohio.

Senator METZENBAUM. Mr. Chairman, my inquiry concerning this group was not——

The CHAIRMAN. Which group are you referring to, Senator?

Senator METZENBAUM. A group that's called Concerned Women for America. It doesn't come about just because I wanted to raise the question of numbers.

It comes about because of the whole thrust of Ms. LaHaye, who is the leader of the group. Some of you recollect that Jack Kemp recently had to disassociate himself from a Reverend LaHaye, who is Mrs. LaHaye's husband, because he had been an evangelical—as a matter of fact, Jack Kemp appointed as national "chairman of his campaign a well-known evangelical couple who have criticized Jews and Catholicism, and insisted that only Christians should hold elective office."

"Brilliant Jewish minds have all too frequently been devoted to philosophies that have proved harmful to mankind," Reverend Tim LaHaye, a fundamentalist minister, wrote in a 1985 book, *The Coming Peace in the Middle East.*

Reverend LaHaye said in another book, "Catholicism is a false religion," adding, "you may be inclined to think me anti-Catholic, but that isn't exactly true. I am anti-false religion. Rome is more dangerous than no religion, because she substitutes religion for truth."

At a conservative convention this year, according to a partial transcript of his remarks provided to the Globe, LaHaye said, "When we say Judeo-Christian, we don't mean the Jews really helped us build this country."

His wife, Beverly LaHaye, who is president of Concerned Women for America, a conservative group, wrote in a 1985 article in USA Today, that politicians who do not use the Bible to guide their public and private lives do not belong in office.

Another point in the article reads, "And in a 1985 newsletter in which he expressed hope for more conservative appointees to the Supreme Court, LaHaye called for a national prayer campaign 'for the removal (by any means God sees fit) of at least three of the Supreme Court members while Ronald Reagan is president.' "

"His wife, in the newspaper article, reinforced her husband's belief in the need for evangelical Christians in government."

Mr. Chairman, I ask that the entire article be included in the record.

The CHAIRMAN. Without objection, it will be entered in the record.

[The following was received for the record:]

STJ (MA) GLOBE
OCTOBER 5, 1987

Kemp aides once critical of Jews, Catholics

By Walter V. Robinson
Globe Staff

WASHINGTON – Rep. Jack F. Kemp this week appointed as national cochairmen of his campaign a well-known evangelical couple who have criticized Jews and Catholicism and insisted that only Christians should hold elective office.

"Brilliant [Jewish] minds have all too frequently been devoted to philosophies that have proved harmful to mankind," Rev. Tim LaHaye, a fundamentalist minister and author, wrote in a 1985 book, "The Coming Peace in the Middle East."

Rev. LaHaye, in another book, said Catholicism is a "false religion," adding, "You may be inclined to think me anti-Catholic, but that isn't exactly true. I am anti-false religion. Rome is more dangerous than no religion, because she substitutes religion for truth."

At a conservative convention this year, according to a partial transcript of his remarks provided to the Globe, LaHaye said: "When we say 'Judeo-Christian,' we don't mean the Jews really helped us build this country."

His wife, Beverly LaHaye, who is president of Concerned Women for America, a conservative group, wrote in a 1985 article in USA Today that "politicians who do not use the Bible to guide their public and private lives do not belong in office."

[LaHaye, in a telephone interview late yesterday with the Baltimore Sun, distanced himself from past writings in which he called Catholicism a "false religion." He also said that if anything he wrote "20 years ago or five years ago in any way hurt Jack in his candidacy," he would "immediately resign" his campaign post.]

In an effort to enhance his appeal to fundamentalist Christians, Kemp named the couple to be his sixth and seventh national cochairmen during a campaign trip to Iowa on Wednesday. With the LaHayes at his side, the Republican presidential candidate cited the inclusive nature of his campaign, and his support by evangelical Christians, ethnic Catholics and Jews. He even noted that his Houston, coordinator Phil Arnoff, is the chairman of the local chapter of the Anti-Defamation League of B'Nai B'rith.

In a telephone interview last night from Concord, N.H., Kemp said he was not aware of LaHaye's controversial writings before the endorsement. But he said, "I'm not endorsing his theological views. He's endorsing me."

The candidate, who hopes that the LaHayes' endorsement will help him offset Pat Robertson's appeal to fundamentalist Christians, said he was reluctant to comment on LaHaye's views without seeing them in their entirety.

"There's no room under my tent for anti-Semitism and religious bigotry," Kemp said. "But I have assurances from Bev and Tim that they are not anti-Semitic or anti-Catholic, and I take them at their word."

Kemp said he believed the LaHaye writings that had been called to his attention amounted to the minister's "theological" views, noting that Jews reject Christian teaching that Christ is the Messiah.

"I should be held accountable for what I say and do, but not for the writings of evangelical Christians who have endorsed me," he said, adding: "I'm in Caesar's world running for president of the United States, and I can't impose

Writings of Kemp cochairmen critical of Jews, Catholics

a theological litmus test on my supporters."

The LaHayes are not the first Kemp supporters whose views have proved troublesome for the Kemp campaign. Last summer, Kemp removed former N.H. State Sen. John P. H. Chandler Jr. from an honorary campaign post after Chandler refused to apologize for remarks that some considered racist. Chandler told a joke about Jesse Jackson's mother and argued that too much race mixing would destroy the white race.

The LaHayes could not be reached last night for comment. But in a statement distributed by the Kemp campaign, Rev. LaHaye denied that he is either anti-Catholic or anti-Semitic, and charged that any suggestions that he is stem from unfair attacks on him by People for the American Way, a liberal lobbying group that among things monitors statements by ministers on the Religious Right.

People for the American Way, which maintains records of such writings, made some of the LaHayes' work available to The Globe.

LaHaye, in the 1985 book – one of 23 that he has published – wrote, "Except for orthodox and conservative Jews, the sons of Jacob have often yielded to a secularistic, even atheistic, spirit. Brilliant minds have all too frequently been devoted to philosophies that have proved harmful to mankind. Consider for example, Karl Marx, Leon Trotsky, Sigmund Freud. . . ."

He added, "Jews of history who have made the greatest humanitarian contributions to Western Civilization have not been atheists, but God-fearing people."

At another point in the book, LaHaye appeared to blame the Jews for Christ's crucifixion. "The Jews rejected the Son of God, crying, 'Crucify Him! Crucify Him! We have no king but Caesar!' In choosing Caesar over Jesus Christ, the Prince of Peace, the people of Palestine brought the judgment of God upon themselves and their land."

In a 1984 article in Religious Broadcasters Magazine, LaHaye wrote that conservatives must continue to control the US government because, he said, "a strong and free America is the launching pad for Christian missions to the people of this whole world."

And in a 1985 newsletter in which he expressed hope for more conservative appointees to the Supreme Court, LaHaye called for a national prayer campaign "for the removal [by any means God sees fit] of at least three of the Supreme Court members while Ronald Reagan is president."

His wife, in the newspaper article, reinforced her husband's belief in the need for evangelical Christians in government, saying, "America is a nation based on biblical principles. Christian values should dominate our government. The test of those values is the Bible. Politicians who do not use the Bible to guide their public and private lives do not belong in office."

Rev. LaHaye, during a 1985 appearance on ABC's Nightline, said, "Secular humanists should not hold political office in America, and the reason I say that is because our Constitution is not compatible with secular humanism without twisting it and changing it."

Rev. LaHaye, who first met Kemp when he was a Baptist pastor in San Diego and Kemp was the quarterback of the San Diego Chargers, is a former vice president of the Moral Majority, president of the American Coalition of Traditional Values and president of Mission to Catholics International, a group that seeks to convert Catholics to fundamentalism.

Kevin Long, the director of Public Affairs at the Milwaukee-based Catholic League for Religious and Civil Rights, said his organization considers Rev. LaHaye to be anti-Catholic. "I have no evidence that he harbors personal animosity toward Catholics," Long said. "But he holds views that grossly misrepresent and distort what Catholics are all about."

Ms. KEPLEY. Mr. Chairman, will I have an opportunity to respond to that?

The CHAIRMAN. Sure. You can respond now, if you would like.

Ms. KEPLEY. Senator Metzenbaum, I welcome the opportunity to respond to that and clarify it, that article, for you.

I do not represent Dr. LaHaye. I do not represent his theological basis. I am here representing Concerned Women for America. It is my understanding that the quotes that you read were taken out of context.

However, I would like to take this opportunity to state very clearly that Concerned Women for America has a very broad constituency, composed of women with professional backgrounds, homemakers, college students, grandmothers. Those women represent a wide variety of religions and faiths. I think that should speak for itself.

We are not anti-Catholic, we are not anti-Semitic. We welcome all religions and all faiths to our organization. Quite frankly, I'm sitting here before this honorable body supporting a Roman Catholic for one of the most powerful seats in the United States.

Senator METZENBAUM. I think your statement is very appropriate, Miss Kepley. As a matter of fact, it would have been much more appropriate had Mrs. LaHaye been here. But since you were speaking for the organization, I thought some of these concerns that I have should be brought out.

Ms. KEPLEY. Well, I appreciate your concern very much, and I appreciate the opportunity to address those concerns. And she did authorize me to speak on her behalf on this matter.

Senator METZENBAUM. Thank you.

Ms. KEPLEY. Thank you, sir.

The CHAIRMAN. Anything further?

Mr. COLLEY. Could I say simply that I had nothing to do with the arrangement of this panel, and I wouldn't want anybody to draw any adverse conclusion from the fact that we're all here together.

The CHAIRMAN. I am sure none of the other panel members are offended.

Mr. PLANT. Mr. Chairman, could I take about 15 seconds——

The CHAIRMAN. Sure. You've been so gracious that we've hardly asked you any questions.

Mr. PLANT. Well, I just want to comment on what I believe to be a very significant fact here. Nathaniel Colley and I have fought each other hard in the courts for many, many years. We have both known Judge Kennedy for over 20 years, 25 years. We have, I think it's fair to say, different views on many social and political issues, Nathaniel and I, and we both came here from Sacramento to tell you that we think that he would make the Supreme—a superb Supreme Court Justice.

The CHAIRMAN. Did you come together?

Mr. PLANT. No. [Laughter.]

Mr. COLLEY. He didn't tell you that when we fought each other, I usually won. [Laughter.]

Mr. PLANT. That's not the way I remember it.

The CHAIRMAN. Well, you have all been very gracious. I think one of the important things about these hearings is to see to it that not only do we get the facts and we deal with serious matters, that

people understand that people who disagree also can disagree agreeably, so we are delighted to have you all here.

We sincerely realize and understand that it is an imposition, and you wouldn't be here if you didn't feel strongly about it, all of you. Thank you for your testimony.

With the grace of God and the good will of neighbors, we will not be asking you to testify or anyone will be on the Supreme Court nominee for a while. I hope we can get to the business of the committee a little bit.

With that, I would like to thank the panel and say "good night", and introduce our last and not the least important—maybe the most important panel—and these folks are always gracious enough to go last. They, in fact, do represent probably more people than about anybody who speaks before us.

Our next panel consists of three witnesses, who are not strangers to this committee. Johnny Hughes is the legislative director of the National Troopers Coalition, which represents approximately 45,000 State Troopers and Highway Patrol Officers. Jerald Vaughn is the executive director of the International Association of Chiefs of Police, a professional organization of more than 14,500 top law enforcement executives. And Dewey Stokes is the national president of the Fraternal Order of Police, the largest member organization of professional law enforcement in the United States, with more than 200,000 members.

We welcome you all back. You are no strangers to this committee, any one of you. In the interest of your time, so that you have more time, there is no need for you to explain to us who you represent, how many people you represent, how many important people are in the organization. And I'm not being facetious when I say that because we know your organizations so well, you've been such an asset to this committee and to the country.

Senator METZENBAUM. Did Dewey Stokes tell you he's from Ohio?

The CHAIRMAN. Dewey and you go through that routine every time Dewey's here. Now we'll go through the Alabama part. Johnny, you're from Alabama?

Mr. HUGHES. No, sir, Maryland.

The CHAIRMAN. Maryland. At any rate, all kidding aside, welcome to you all. Really, fellows, I thank you. During the Bork testimony you went last, and it was at about this hour of the night when you went, and here you are again. But we're here also because we're anxious to hear what you have to say.

So why don't we start with you, Trooper Hughes, and then we'll work our way across the table.

Excuse me. Would you all stand to be sworn, please? Do you swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. HUGHES. I do, sir.

Mr. VAUGHN. I do.

Mr. STOKES. I do, sir.

The CHAIRMAN. Trooper?

TESTIMONY OF A PANEL CONSISTING OF JOHNNY L. HUGHES, DIRECTOR, LEGISLATIVE AND CONGRESSIONAL AFFAIRS, NATIONAL TROOPERS COALITION; JERALD R. VAUGHN, EXECUTIVE DIRECTOR, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE; AND DEWEY R. STOKES, NATIONAL PRESIDENT, FRATERNAL ORDER OF POLICE

Mr. HUGHES. Mr. Chairman, honorable members of this distinguished committee, I wish to thank the committee for once again giving my organization the opportunity to speak on the proposed nomination of Supreme Court Justice, an office to which only the most qualified should be appointed. I note in this regard that the nominee has been rated "well qualified" by the American Bar Association.

The National Trooper's Coalition, having reviewed the positions taken by Judge Kennedy in numerous cases involving issues of criminal law, believes him to be eminently qualified and urges his speedy confirmation to this most important position. Judge Kennedy, who has lengthy experience within our judicial system, having served for 12 years as a member of the U.S. Court of Appeals for the Ninth Circuit, has amassed a record of participating in some 1,400 decisions, authoring over 400 of these.

It is in the area of criminal law that we believe Judge Kennedy would prove to be an outstanding jurist. He has shown throughout his 12 years on the Federal bench a keen understanding of the challenges facing police officers in their struggle against society's criminal element. Police officers risk their lives and, unfortunately, too often give them in this battle that can at times be made frustrating by rulings that protect the criminal over the rights of society as a whole.

Judge Kennedy, recognizing the difficulties facing officers and appreciating the costs paid by all citizens of this country if relevant evidence is excluded and the guilty are allowed to go unpunished, has been in the forefront of those members of the judiciary taking a second look at the exclusionary rule.

Writing in a dissent in *United States* v. *Leon,* Judge Kennedy believed that the rigidities of the exclusionary rule had been stretched beyond reason under the facts of that case, a position later adopted in that case by the Supreme Court when it recognized a good faith exception to the rule.

In *United States* v. *Harvey,* he argued, again in dissent, that the results of blood alcohol test had been properly admitted in a manslaughter case. Judge Kennedy, arguing that the officer had acted in good faith and with probable cause in taking the blood sample, would not have excluded the results of the test simply because the defendant had not been arrested prior to the taking of the sample. He again warned against such illogical application of the exclusionary rule, writing:

> If the exclusionary rule becomes an end in itself, and the courts do not apply it in a sensible and predictable way, then one approach is to reexamine it altogether. We do not have that authority, but we do have the commission and the obligation to confine the rule to the purposes for which it was announced.
>
> The exclusionary rule seems to have acquired such independent force that it operates without reference to any improper conduct by the police.

In other areas of criminal law, we believe that Judge Kennedy has distinguished himself with his positions taken. He has upheld the conviction of drug smugglers where evidence was gathered by the use of helicopter overflights of the defendant's property. In another matter, he upheld the death penalty for an inmate who murdered a fellow inmate while serving a life term without parole for previous rapes and murders of two teenagers. He has, we believe, struck a proper balance between protecting the rights of society to enforce its laws and upholding the constitutional rights of an accused at the same time.

The National Trooper's Coalition urges the Senate Judiciary Committee membership to endorse this nomination, and we hope for the earliest possible confirmation by the U.S. Senate.

Thank you once again for giving us the opportunity to express our views.

[The statement of Johnny L. Hughes follows:]

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LEGAL COUNSEL
MICHAEL G. O'ROURKE, Jr.
[illegible]

BEFORE

THE UNITED STATES SENATE

JUDICIARY COMMITTEE

CONFIRMATION HEARING

FOR

THE HONORABLE ANTHONY M. KENNEDY

AS

ASSOCIATE JUSTICE

OF THE UNITED STATES SUPREME COURT

SPEAKING IN FAVOR OF THE NOMINATION

THE NATIONAL TROOPERS COALITION

JOHNNY L. HUGHES
DIRECTOR, LEGISLATIVE AND
CONGRESSIONAL AFFAIRS

PARTICIPATING MEMBER, NATIONAL LAW
ENFORCEMENT COUNCIL

THE UNITED STATES SENATE JUDICIARY COMMITTEE

December, 1987

CONFIRMATION HEARING
ANTHONY M. KENNEDY
FOR ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT

TESTIFYING: 1/LT. JOHNNY L. HUGHES
Maryland State Police
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LIEUTENANT HUGHES, A TWENTY YEAR VETERAN OF THE MARYLAND STATE POLICE, IS DIRECTOR OF LEGISLATIVE AND CONGRESSIONAL AFFAIRS FOR THE NATIONAL TROOPERS COALITION. THE NATIONAL TROOPERS COALITION IS COMPOSED OF STATE POLICE AND HIGHWAY PATROL AGENCIES THROUGHOUT THE UNITED STATES AND HAS A MEMBERSHIP OF APPROXIMATELY 45,000 TROOPERS.

MR. CHAIRMAN, HONORABLE MEMBERS OF THIS DISTINGUISHED COMMITTEE.

I AM JOHNNY L. HUGHES, TESTIFYING ON BEHALF OF, AND AS DIRECTOR OF LEGISLATIVE AND CONGRESSIONAL AFFAIRS FOR, THE NATIONAL TROOPERS COALITION. OUR ORGANIZATION, COMPOSED OF APPROXIMATELY 45,000 MEMBERS, REPRESENTS TROOPERS FROM STATE POLICE AND HIGHWAY PATROL AGENCIES THROUGHOUT THE UNITED STATES. WE BELIEVE, HOWEVER, THAT WE SPEAK TO THE SAME CONCERNS AS DO MANY MILLIONS OF OUR FELLOW CITIZENS FOR A FAIR AND IMPARTIAL JUDICIARY AND ONE THAT PROTECTS THE RIGHTS OF SOCIETY TO EFFECTIVELY ENFORCE ITS CRIMINAL LAWS.

I WISH TO THANK THE COMMITTEE FOR ONCE AGAIN GIVING MY ORGANIZATION THE OPPORTUNITY TO SPEAK ON THE PROPOSED NOMINATION

OF A SUPREME COURT JUSTICE, AN OFFICE TO WHICH ONLY THE MOST QUALIFIED SHOULD BE APPOINTED. I NOTE IN THIS REGARD THAT THE NOMINEE HAS BEEN RATED "WELL QUALIFIED" BY THE AMERICAN BAR ASSOCIATION.

THE NATIONAL TROOPER'S COALITION, HAVING REVIEWED THE POSITIONS TAKEN BY JUDGE KENNEDY IN NUMEROUS CASES INVOLVING ISSUES OF CRIMINAL LAW, BELIEVES HIM TO BE EMINENTLY QUALIFIED AND URGES HIS SPEEDY CONFIRMATION TO THIS MOST IMPORTANT POSITION. JUDGE KENNEDY, WHO HAS LENGTHY EXPERIENCE WITHIN OUR JUDICIAL SYSTEM, HAVING SERVED FOR 12 YEARS AS A MEMBER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, HAS AMASSED A RECORD OF PARTICIPATING IN SOME 1,400 DECISIONS, AUTHORING OVER 400 OF THESE.

IT IS IN THE AREA OF CRIMINAL LAW THAT WE BELIEVE JUDGE KENNEDY WOULD PROVE TO BE AN OUTSTANDING JURIST. HE HAS SHOWN THROUGHOUT HIS 12 YEARS ON THE FEDERAL BENCH A KEEN UNDERSTANDING OF THE CHALLENGES FACING POLICE OFFICERS IN THEIR STRUGGLE AGAINST SOCIETY'S CRIMINAL ELEMENT. POLICE OFFICERS RISK THEIR LIVES, AND UNFORTUNATELY TOO OFTEN GIVE THEM, IN THIS BATTLE THAT CAN AT TIMES BE MADE FRUSTRATING BY RULINGS THAT PROTECT THE CRIMINAL OVER THE RIGHTS OF SOCIETY AS A WHOLE.

JUDGE KENNEDY, RECOGNIZING THE DIFFICULTIES FACING OFFICERS AND APPRECIATING THE COSTS PAID BY ALL CITIZENS OF THIS COUNTRY IF RELEVANT EVIDENCE IS EXCLUDED AND THE GUILTY ARE ALLOWED TO GO UNPUNISHED, HAS BEEN IN THE FOREFRONT OF THOSE MEMBERS OF THE JUDICIARY TAKING A SECOND LOOK AT THE EXCLUSIONARY RULE.

WRITING IN A DISSENT IN UNITED STATES v. LEON, JUDGE KENNEDY BELIEVED THAT THE RIGIDITIES OF THE EXCLUSIONARY RULE HAD BEEN STRETCHED BEYOND REASON UNDER THE FACTS OF THAT CASE, A POSITION LATER ADOPTED IN THAT CASE BY THE SUPREME COURT WHEN IT RECOGNIZED A GOOD FAITH EXCEPTION TO THE RULE. IN UNITED STATES v. HARVEY, HE ARGUED, AGAIN IN DISSENT, THAT THE RESULTS OF A BLOOD ALCOHOL TEST HAD BEEN PROPERLY ADMITTED IN A MANSLAUGHTER CASE. JUDGE KENNEDY, ARGUING THAT THE OFFICER HAD ACTED IN GOOD FAITH AND WITH PROBABLE CAUSE IN TAKING THE BLOOD SAMPLE, WOULD NOT HAVE EXCLUDED THE RESULTS OF THE TEST SIMPLY BECAUSE THE DEFENDANT HAD NOT BEEN ARRESTED PRIOR TO THE TAKING OF THE SAMPLE. HE AGAIN WARNED AGAINST SUCH ILLOGICAL APPLICATION OF THE EXCLUSIONARY RULE, WRITING:

> "IF THE EXCLUSIONARY RULE BECOMES AN END IN ITSELF, AND THE COURTS DO NOT APPLY IT IN A SENSIBLE AND PREDICTABLE WAY, THEN ONE APPROACH IS TO REEXAMINE IT ALTOGETHER. WE DO NOT HAVE THAT AUTHORITY, BUT WE DO HAVE THE COMMISSION, AND THE OBLIGATION, TO CONFINE THE RULE TO THE PURPOSES FOR WHICH IT WAS ANNOUNCED.
>
> THE EXCLUSIONARY RULE SEEMS TO HAVE ACQUIRED SUCH INDEPENDENT FORCE THAT IT OPERATES WITHOUT REFERENCE TO ANY IMPROPER CONDUCT BY THE POLICE."

IN OTHER AREAS OF CRIMINAL LAW WE BELIEVE THAT JUDGE KENNEDY HAS DISTINGUISHED HIMSELF WITH HIS POSITIONS TAKEN. HE HAS UPHELD THE CONVICTION OF DRUG SMUGGLERS WHERE EVIDENCE WAS GATHERED BY THE USE OF HELICOPTER OVERFLIGHTS OF THE DEFENDANT'S PROPERTY. IN ANOTHER MATTER, HE UPHELD THE DEATH PENALTY FOR AN

INMATE WHO MURDERED A FELLOW INMATE WHILE SERVING A LIFE TERM WITHOUT PAROLE FOR PREVIOUS RAPES AND MURDERS OF TWO TEENAGERS. HE HAS, WE BELIEVE, STRUCK A PROPER BALANCE BETWEEN PROTECTING THE RIGHTS OF SOCIETY TO ENFORCE ITS LAWS AND UPHOLDING THE CONSTITUTIONAL RIGHTS OF AN ACCUSED.

THE NATIONAL TROOPER'S COALITION URGES THE SENATE JUDICIARY COMMITTEE MEMBERSHIP TO ENDORSE THIS NOMINATION AND WE HOPE FOR THE EARLIEST POSSIBLE CONFIRMATION BY THE UNITED STATES SENATE.

THANK YOU ONCE AGAIN FOR GIVING US THE OPPORTUNITY TO EXPRESS OUR VIEWS.

The CHAIRMAN. Thank you very much.

Mr. Vaughn.

Mr. VAUGHN. Thank you very much, Senator, for the opportunity to be here and testify on this matter that is of utmost importance to the police in this country, since clearly the majority of cases reviewed by the Supreme Court deal with criminal issues.

We're living in a very difficult period in this country, and the predictions with respect to crime and what will happen in this country if it continues to escalate at its current rate are—quite frankly—frightening, as we have analyzed this issue. We are here prepared to strongly support the nomination of Judge Kennedy for the Supreme Court.

We think his credentials speak for themselves. I came here authorized by our executive committee, which is the governing body of the association, which consists of 52 of the top law enforcement officials in the United States, to offer our unqualified support and endorsement of this nomination.

We have reviewed Judge Kennedy's record extensively and we're satisfied that he will fairly and evenly adjudicate criminal matters coming before him, and he will fairly and consistently interpret the law and that he will, as much as humanly possible, balance the rights of victims, the rights of the accused, and the rights of the citizens of our great nation to live a crime-free life.

We support Judge Kennedy's nomination for a number of reasons. First, Judge Kennedy's philosophy of judicial restraint, as clearly demonstrated in the more than 400 opinions he has authored on the U.S. Court of Appeals for the Ninth Circuit.

Second, Judge Kennedy's decisions reflect due regard for the role of States in our federal system. Third, Judge Kennedy has fairly interpreted the exclusionary rule. He has argued that whatever the merits of the exclusionary rule, its rigidities become compounded unacceptably when courts presume innocent conduct, when the only common sense explanation for it is ongoing criminal activity. This speaks directly to one of law enforcement's greatest concerns with the exclusionary rule; that is, when common sense is left out of the interpretive process.

Fourth, Judge Kennedy has also supported the use of the death penalty, which we endorse as an appropriate measure of punishment for certain criminal acts.

Fifth, Judge Kennedy has upheld maximum sentences against drug dealers, and has upheld the constitutional validity of the actions of foreign governments cooperating with the United States in antidrug ventures. Perhaps one of the most difficult issues for law enforcement officers is to understand the unjustified and unrealistic suspicion of some judges towards all law enforcement officials. I can't tell you the toll this takes on our morale. Judge Kennedy does not share this view of law enforcement. As a matter of fact, he stated in the *Darvon* v. *Norse* case:

> Were a juror to announce that most law enforcement officers by reason of their profession and their oath are trustworthy and honest, but that similar respect cannot be accorded prisoners, I should be gratified, not shocked. Those principles are consistent with the responsible citizenship and are not a ground to challenge the juror for cause.

Judge Kennedy is an experienced and impartial jurist. His 12 years of service on the U.S. Court of Appeals for the Ninth Circuit, together with his experience in private practice, make him an outstanding nominee to the U.S. Supreme Court.

The American Bar Association gave him their highest rating. The International Association of Chiefs of Police supports his nomination without qualification, and we do urge you to confirm him as an Associate Justice to the highest court in our land.

Again, I deal with police chiefs every day. There is a growing concern, particularly given the fact that we've experienced the highest rate of crime in two decades, a 12 percent increase in violent crime. Our nation can ill-afford a Supreme Court Justice that cannot apply common sense and balance the rights of the majority with the rights of the accused and give us the opportunity to live a life free of unnecessary crime.

Thank you very much for the opportunity to make our presentation.

[The statement of Jerald R. Vaughn follows:]

TESTIMONY BY

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

BEFORE THE

SENATE JUDICIARY COMMITTEE

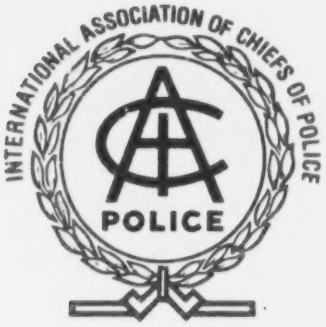
CONCERNING THE CONFIRMATION OF

JUDGE ANTHONY M. KENNEDY

TO

THE SUPREME COURT OF THE UNITED STATES

DECEMBER 15, 1987



The International Association of Chiefs of Police is a professional organization comprised of over 14,500 top law enforcement executives from the United States and 68 nations. IACP members lead and manage several hundred thousand law enforcement officers and civilian employees in international, federal, state and local governments. Members in the United States direct the nation's largest city police departments including New York City, Los Angeles, Chicago, Detroit, Houston and others, as well as suburban and rural departments throughout the country.

Since 1893, the IACP has facilitated the exchange of important information among police administrators and promoted the highest possible standards of performance and conduct within the police profession. This work is carried out by functionally oriented committees consisting of police practitioners with a high degree of expertise that provide contemporary information on trends, issues and experiences in policing for development of cooperative strategies, new and innovative programs and positions for adoption through resolution by the association.

Throughout its existence, the IACP has been devoted to the cause of crime prevention and the fair and impartial enforcement of laws with respect for constitutional and fundamental human rights.

Jerald R. Vaughn was appointed Executive Director of the 14,000 member International Association of Chiefs of Police on September 10, 1985. IACP is the world's largest association of police executives with members in the United States and sixty-seven overseas nations.

Director Vaughn is a native of Denver, Colorado, and received his Bachelors of Science Degree in the Administration of Justice from Metropolitan State College and Masters Degree in Public Administration from the University of Northern Colorado.

Director Vaughn began his law enforcement career in February 1968 with the Englewood, Colorado Police Department. He worked assignments in radio car and foot patrol, as a Field Training Officer, a Traffic Officer in the Traffic Bureau, and served fourteen months as an undercover agent in a federally funded multi-jurisdictional drug task force where he received a citation for service above and beyond the call of duty from the Governor of the State of Colorado. Director Vaughn was promoted to the rank of Sergeant, where he held assignments as a Field Supervisor, Tactical Team Leader, Internal Affairs Supervisor, and as the Administrative Assistant to the Chief of Police. Director Vaughn was promoted to the rank of Lieutenant and held assignments in the Patrol and Administration Division, and was serving as Commander of the Support Service Unit when he was appointed Chief of Police of the sixty-eight member Garden City, Kansas Police Department. Director Vaughn was then appointed to the position of Chief of Police of the 173 member Largo, Florida Police Department in May 1983.

GOOD MORNING SENATOR BIDEN AND MEMBERS OF THE JUDCIAIRY COMMITTEE. MY NAME IS JERALD R. VAUGHN AND I AM THE EXECUTIVE DIRECTOR OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE. (IACP). WE ARE PLEASED TO STRONGLY SUPPORT THE NOMINATION OF JUDGE ANTHONY M. KENNEDY TO THE SUPREME COURT OF THE UNITED STATES. THE IACP EXECUTIVE COMMITTEE, BY MAJORITY VOTE AT THEIR DECEMBER MEETING IN LOUISVILLE, KENTUCKY, PLEDGED THEIR SUPPORT TO JUDGE KENNEDY. WE BELIEVE THAT HIS EXPERIENCE AND CREDENTIALS SPEAK FOR THEMSELVES. WE URGE THE JUDICIARY COMMITTEE TO QUICKLY CONFIRM HIM, THUS BRINGING THE COURT BACK TO ITS FULL COMPLEMENT OF JURISTS.

AS MEMBERS OF THE LAW ENFORCEMENT COMMUNITY, WE ARE EXTREMELY CONCERNED WITH ALL ELEMENTS OF THE CRIMINAL JUSTICE SYSTEM. THE SUPREME COURT IS THE HIGHEST COURT IN THE LAND; THEREFORE, IT IS OF GREAT IMPORTANCE TO US. CRIMINAL CASES MAKE UP THE LARGEST SINGLE CATEGORY OF CASES HEARD BY THIS COURT. THESE CASES ALSO HAVE THE MOST IMMEDIATE IMPACT ON OUR CITIZENS AND ON THE LAW ENFORCEMENT PERSONNEL IACP REPRESENTS.

WE HAVE REVIEWED JUDGE KENNEDY'S RECORD EXTENSIVELY AND WE ARE SATISFIED THAT HE WILL FAIRLY AND EVENLY ADJUDICATE THE CRIMINAL MATTERS COMING BEFORE HIM, THAT HE WILL FAIRLY AND CONSISTENTLY INTERPRET THE LAW, AND THAT HE WILL, AS MUCH AS HUMANLY POSSIBLE, BALANCE THE RIGHTS OF VICTIMS, THE RIGHTS OF THE ACCUSED, AND THE RIGHTS OF THE CITIZENS OF OUR GREAT NATION TO LIVE A CRIME FREE LIFE.

AS WE HAVE SAID TO THIS COMMITTEE PREVIOUSLY, WE ARE INTERESTED IN A GOVERNING SYSTEM THAT RESPECTS THE IDEA THAT SOME ISSUES ARE TO BE DECIDED BY THE STATES. WE CERTAINLY SUPPORT THE NOTION OF JUDICIAL REVIEW, BUT WE DO NOT THINK THAT COURTS HAVE BEEN VESTED WITH THE POWER TO SIT AS SUPERVISORY AGENCIES OVER ACTS OF DULY CONSTITUTED LEGISLATIVE BODIES AND SET ASIDE THEIR LAWS BECAUSE OF THE COURT'S BELIEF THAT THE LEGISLATIVE POLICIES ADOPTED ARE UNREASONABLE, UNWISE, ARBITRAY, CAPRICIOUS OR IRRATIONAL. WE BELIEVE THAT IT IS THE COURT'S FUNCTION TO OVERTURN LAWS PASSED BY STATE LEGISLATURES WHEN THE LAW VIOLATES A CLEAR CONSTITUTIONAL PROVISION. OUR RESEARCH SHOWS THAT JUDGE

KENNEDY SHARES OUR POINT OF VIEW.

JUDGE KENNEDY'S PHILOSOPHY OF JUDICIAL RESTRAINT IS CLEARLY DEMONSTRATED IN THE MORE THAN 400 OPINIONS HE HAS AUTHORED ON THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. HE HAS REFUSED TO MAKE NEW LAW (IN THE AREA OF COMPARABLE WORTH; AFSCME V. STATE OF WASHINGTON, 1985); HE HAS VOTED AGAINST EXPANDING FEDERAL POWER BEYOND "...WHERE THE WORDS OF THE STATUTE LEAD." (SCHREIBER DISTRIBUTING CO. V. SERV-WELL FURNITURE CO., 1986); HE HAS WRITTEN OPINIONS NOTING THAT MISTAKES IN STATUTORY CONSTRUCTION MUST BE REMEDIED BY THE CONGRESS AND NOT THE COURTS (U.S. V. BELL, 1984).

JUDGE KENNEDY'S DECISIONS REFLECT DUE REGARD FOR THE ROLE OF STATES IN OUR FEDERAL SYSTEM. HE HAS DECIDED CASES BY NOTING THAT THE ISSUE AT HAND (IN ONE CASE, WRONGFUL DISCHARGE) WAS A MATTER OF STATE CONCERN, AND FEDERAL LAWS IN THAT AREA WERE NOT INTENDED TO SUPERCEDE STATE REGULATION.[OSTROFE V. CROCKER (1982)]

JUDGE KENNEDY HAS ALSO RULED ON THE EXCLUSIONARY RULE,

A CRIMINAL PROCEDURE QUESTION THAT IS VERY INTEGRAL TO LAW ENFORCEMENT PROCEDURES. IN A DRUG CASE [UNITED STATES V. LEON] THE JUDGE DISSENTED FROM A DECISION THAT THE EVIDENCE SHOULD BE THROWN OUT BECAUSE , IN THE MAJORITY'S VIEW, IT WAS BASED ON AN INVALID SEARCH WARRANT. HE ARGUED THAT THE WARRANT WAS IN FACT VALID, STATING: "WHATEVER THE MERITS OF THE EXCLUSIONARY RULE, ITS RIDIGITIES BECOME COMPOUNDED UNACCEPTABLY WHEN COURTS PRESUME INNOCENT CONDUCT WHEN THE ONLY COMMON SENSE EXPLANATION FOR IT IS ON-GOING CRIMINAL ACTIVITY." WE WOULD NOTE THAT ON APPEAL, THE SUPREME COURT, WITHOUT EXAMINING THE VALIDITY OF THE WARRANT, CREATED A NEW "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE. JUDGE KENNEDY QUITE APTLY REPRESENTED ONE OF LAW ENFORCEMENT GREATEST CONCERNS WITH THE COURT'S INTERPRETATION OF THE EXCLUSIONARY RULE, THAT IS, WHEN "COMMON SENSE" IS LEFT OUT OF THE INTERPRETATIVE PROCESS. WE TOTALLY AGREE WITH HIS POSITION ON THIS ISSUE.

JUDGE KENNEDY ALSO HAS SUPPORTED THE USE OF THE DEATH PENALTY, WHICH WE ENDORSE. IN ONE CASE [NEUSCHAFER V. WHITLEY,

(1987)], THE JUDGE FIRST REMANDED THE CASE TO THE LOWER COURT TO ASSURE THAT ALL LEGAL PROCEDURES HAD BEEN OBSERVED. HOWEVER, WHEN THE LOWER COURT DETERMINED THAT SUCH WAS THE CASE, THE JUDGE FIRMLY UPHELD THE IMPOSTION OF THE DEATH PENALTY.

AS LAW ENFORCEMENT EXECUTIVES, WE ARE GREATLY INVOLVED IN THE WAR AGAINST ILLEGAL NARCOTICS IN OUT COUNTRY. SUPREME COURT DECISIONS HAVE A VITAL IMPACT ON THIS AREA OF THE LAW. JUDGE KENNEDY HAS UPHELD MAXIMUM SENTENCES AGAINST DRUG DEALERS [U.S. V. STEWART (1987)] AND UPHELD THE CONSTITUTIONAL VALIDITY OF THE ACTIONS OF FOREIGN GOVERNMENTS COOPERATING WITH THE UNITED STATES IN ANTI-DRUG VENTURES [U.S. V. PETERSON (1987)]. WE RESPECT HIS OPINIONS IN THIS AREA ALSO.

PERHAPS ONE OF THE MOST DIFFICULT ISSUES FOR LAW ENFORCEMENT OFFICERS TO UNDERSTAND IS THE UNJUSTIFIED AND UNREALISTIC SUSPICION OF SOME JUDGES TOWARD ALL LAW ENFORCEMENT OFFICIALS. IN MANY INSTANCES, WHEN WE TAKE THE STAND AT TRIALS, WE MUST FIRST ESTABLISH OUR CREDIBILITY AND HONESTY, NOT ON THE BASIS OF EVIDENCE PRESENTED AT TRIAL, BUT BASED ON THE FACT THAT

WE WEAR A BLUE UNIFORM. I CANNOT TELL YOU THE TOLL THIS TAKES ON OUR MORALE. JUDGE KENNEDY DOES NOT SHARE THIS VIEW OF LAW ENFORCEMENT. HE HAS STATED THAT

> "WERE A JUROR TO ANNOUNCE THAT MOST LAW OFFICERS, BY REASON OF THEIR PROFESSION AND THEIR OATH, ARE TRUSTWORTHY AND HONEST BUT THAT SIMILAR RESPECT CANNOT BE ACCORDED TO PRISONERS, I SHOULD BE GRATIFIED, NOT SHOCKED. THOSE PRINCIPLES ARE CONSISTENT WITH A RESPONSIBLE CITIZENSHIP AND ARE NOT A GROUND TO CHALLENGE THE JUROR FOR CAUSE."
>
> JUDGE ANTHONY KENNEDY
> DARVIN V. NOURSE, 664 F.2D 1109 (1981)

JUDGE KENNEDY IS AN EXPERIENCED AND IMPARTIAL JURIST. HIS TWELVE YEARS OF SERVICE ON THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TOGETHER WITH HIS EXPERIENCE IN PRIVATE PRACTICE, MAKE HIM AN OUTSTANDING NOMINEE TO THE UNITED STATES SUPREME COURT. THE AMERICAN BAR ASSOCIATION HAS GIVEN HIM THEIR HIGHEST RATING. THE IACP SUPPORTS HIS NOMINATION WITHOUT QUALIFICATION. WE URGE YOU TO CONFIRM HIM AS AN ASSOCIATE JUSTICE OF THE HIGHEST COURT IN OUR LAND.

THANK YOU VERY MUCH GENTLEMEN. I WOULD BE HAPPY TO RESPOND TO ANY OF YOUR QUESTIONS.

The CHAIRMAN. Thank you very much. Mr. Stokes.

Mr. STOKES. Good evening, Mr. Chairman, and members of the committee. It's a privilege and an honor to again appear before you in order to participate in these important proceedings. As the largest member organization of law enforcement professionals in the United States, we are vitally interested in the pending nomination of Judge Anthony M. Kennedy to become an Associate Justice of the U.S. Supreme Court.

Roughly, as we have said before, one-third of the Supreme Court's docket consists of criminal matters. We believe that a review of the nominee's views on criminal justice issues is essential, and it is our believe that Judge Kennedy has a sophisticated, yet common sense understanding of, and respect for, our criminal justice system. We believe that Judge Kennedy's strong academic background, his year in private practice, and his experience as a jurist, equips him to confront the many complex criminal justice issues that so vitally affect the law enforcement on a daily basis.

We are aware that over the span of his judicial career Judge Kennedy has confronted cases in which virtually every interest group known, including law enforcement, has had an interest. It is significant that Judge Kennedy's decisions have not always sided with any of these groups, including us, law enforcement.

Judge Kennedy has decided cases in favor of criminal defendants, and against the Government. He has decided cases in favor of management and against labor. He has decided cases in favor of private litigants and against police defendants. Yet, upon review of these cases, and all his cases, what emerges is a judge who follows the law. If bad facts compel an unpleasant result, Judge Kennedy follows the law without regard to the interest groups that may benefit. In the final analysis, we believe that that is just what we need, a Justice who adheres to the rules of law as opposed to one who attempts to create rules of law.

In our statement, which I have submitted for inclusion in the record, we have made reference to just a few of the hundreds of cases decided by Judge Kennedy. I will not reiterate those references. I do believe that a few points are worth mentioning.

Judge Kennedy has written, as John said, on the exclusionary rule, and we believe this to be a common-sense judging premised on the sophisticated understanding, the purpose of which the exclusionary rule was first developed.

Judge Kennedy has confined himself to the issues before him. His decisions adhere to precedent and do not speak to create judge-made law, whether in favor of or contrary to any particular interest.

In *United States* v. *Leon*, the Ninth Circuit suppressed the necessary evidence on the basis of staleness of document. In his dissent, Judge Kennedy found that the evidence should not have been suppressed and that there was sufficient probable cause and that common sense compelled such a conclusion. Later, the U.S. Supreme Court also found the evidence should not be suppressed, although its decision announced the so-called "good faith" exception to the warrant requirements.

Judge Kennedy's decision in the *Barker* v. *Morris* case, the sixth amendment case, this was another example of judicial common

sense; allowing the use of videotape at the preliminary hearing, testimony of a witness prevented the defendant from benefiting from successfully avoiding apprehension until after the witness had died. Because that testimony had been substantiated in specific indicia of the liability, Judge Kennedy held that the confrontation clause had not been violated.

Judge Kennedy's decision in the Fifth Amendment case also demonstrated his scholarly yet common-sense approach to criminal justice, Judge Kennedy's dissent in *Adamson* v. *Ricketts*, which would have prevented the murderer from going free.

A majority of the U.S. Supreme Court, including Justice Powell, agreed with the dissent. Adamson was a contract killer that did not go free.

Judge Kennedy's decisions are not pro police, they are pro justice. He has decided cases as a result of which convictions were overturned, evidence suppressed, and criminal defendants have gone free. Yet, when we review the totality of his writings, Judge Kennedy emerges as a fair-minded, principled, and common-sense judge, one with the opinion of police, that we share, and he so adequately described, and Jerry covered—when he announced to the juror—to announce that the most law-enforcement officers, by reason of their profession and their oath, are trustworthy and honest—but that similar respect cannot be afforded to prisoners, I should be gratified, not shocked. Those principles are consistent with a responsible citizen.

—Based on his common sense, and his practice before the courts, and his interpretation of his rulings, we, in law enforcement, in the Fraternal Order of Police, urge you to confirm our new Associate Justice as soon as possible.

Thank you for the opportunity to speak to you this evening, Mr. Chairman.

[Statement of Dewey Stokes follows:]

STATEMENT OF DEWEY STOKES
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF ANTHONY M. KENNEDY
TO THE SUPREME COURT OF THE UNITED STATES

Good afternoon. Mr. Chairman, members of the Committee, I am Dewey Stokes, National President of the Fraternal Order of Police. The Fraternal Order of Police is the largest member organization of professional law enforcement personnel in the United States. Our organization is comprised of local lodges belonging to State lodges which, in turn, belong to the Grand Lodge, of which I am National President. I am also President of my local lodge (No. 9), Columbus, Ohio. The Fraternal Order of Police consists of almost 200,000 members including municipal police officers, state troopers, sheriff's deputies, federal law enforcement officers, and virtually every other form of law enforcement officers in the United States.

Our organization's purpose, as stated in our Constitution is:

> To support and defend the Constitution of the United States; to inculcate loyalty and allegiance to the United States of America; [and] to promote and foster the enforcement of law and order . . .

This is consonant with the preamble to our nation's Consitution in its reference "to insure domestic tranquility." Our membership consists of devoted men and women of all races, colors and national origins who share these common goals, and we are very grateful to be afforded this opportunity to appear before your distinguished panel to participate in this historic and constitutional process.

Mr. Chairman, I appear before this distinguished Committee today to express the support of the Fraternal Order of Police for the nomination of Judge Anthony M. Kennedy to become an Associate Justice of the United States Supreme Court. The Fraternal Order of Police is vitally interested in the appointment of a jurist with a sophisticated yet common sense understanding of and respect for our criminal justice system. We believe that Judge Kennedy is such an individual and I would like to take this opportunity to provide the Committee with some of our bases for our belief.

As you know, the Supreme Court spends nearly one-third of its time determining matters of criminal justice. Therefore, it is essential that a nominee's position on such issues be reviewed when considering his appointment to the Court. During his tenure on the Ninth Circuit Court of Appeals, Judge Kennedy has participated in hundreds of criminal law decisions. Such experience will enable him to add principled reasoning and insight into cases appearing before the Supreme Court.

Judge Kennedy is keenly aware of the severe toll that crime exacts upon its victims. In a recent speech delivered before the Sixth South Pacific Judicial Conference,[1] Judge Kennedy stressed that a crime victim suffers enormous psychological trauma and that the criminal justice system is often insensitive to the victim's needs. Daily, members of the Fraternal Order of Police work with victims of crime. We firmly

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[1]March 3-5, 1987.

believe that the system is never more insensitive to those victims than when a criminal goes free because a court has interpreted a defendant's constitutional rights in an overly expansive, hyper-technical way.

Judge Kennedy's decisions reflect his compassion toward victims of crime. He has repeatedly refused to engage in overly broad interpretations of the rights afforded criminal defendants by the Constitution. Judge Kennedy interprets the Constitution narrowly and applies its principles to the precise issues before him. The result is a reasoned, pragmatic decision that goes no further than necessary to dispose of the case at hand.

Judge Kennedy consistently applies this disciplined approach to all aspects of the criminal law. For example, Judge Kennedy is very cautious about allowing a defendant to invoke the Exclusionary Rule to prevent probative evidence from reaching the jury. He has written,

> If the exclusionary rule becomes an end in itself and the courts do not apply it in a sensible and predictable way, then one approach is to reexamine it altogether. We do not have that authority, but we do have the commission and the obligation to confine the rule to the purposes for which it was announced.
>
> In this case the exclusionary rule seems to have acquired such independent force that it operates without reference to any improper conduct by the police. The rule is torn from its pragmatic mooring, for a premise of the decision is that the officer acted not only in good faith but also with probable cause under exigent circumstances."[2]

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[2]United States v. Harvey, 711 F.2d 144 (9th Cir. 1983) (Kennedy, J., dissenting).

In United States v. Leon,[3] a majority of the court found that a search warrant was not supported by probable cause and therefore excluded all evidence discovered in the search. The majority found the warrant to be invalid because information contained in the underlying affidavit was stale (over five months old). In his dissenting opinion, Judge Kennedy reasoned that although the initial information contained in the affidavit was five months old, the defendant had been observed in a continuing course of suspicious conduct which validated that information. Judge Kennedy found that the original information plus the continuing conduct, when considered as a whole, constituted probable cause. He would have allowed evidence discovered in the search to be admitted in the trial.

The purpose of the Exclusionary Rule is to deter improper police behavior.[4] Judge Kennedy recognized that there was no improper police behavior in Leon. The officers relied, in good faith, on a search warrant that was later held invalid. Judge Kennedy wisely refused to apply the Exclusionary Rule under such circumstances. The legal basis for his decision was strict adherence to controlling precedent, thus leading to the conclusion that probable cause existed. On review, the Supreme Court also recognized that the Exclusionary Rule should not apply where the officers had relied on the warrant in good faith. In a

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[3]No. 82-1093 (9th Cir. Jan. 19, 1983), rev'd, 468 U.S. 897 (1984).

[4]Harvey, 711 F.2d at 144.

landmark decision, the Supreme Court reversed the Ninth Circuit and created a new, "good faith exception" to the Rule.[5]

Judge Kennedy also exhibits principled reasoning and respect for precedent in determining the scope of Fourth Amendment protection. In United States v. Sherwin[6], the Court considered whether the defendant's Fourth Amendment rights were violated when FBI agents took possession of allegedly obscene materials prior to obtaining a search warrant. In that case, a trucking terminal received a shipment of 17 cartons, several of which were damaged. Pursuant to company regulations the terminal manager inventoried the contents of the damaged cartons. These contents appeared to be obscene, so the manager notified the FBI. When the FBI agents arrived, the manager voluntarily gave them copies of two of the books to take to the United State's attorney and the books were then used as a basis for obtaining a search warrant.

The defendant claimed his Fourth Amendment rights had been violated and sought to have the evidence seized excluded at his trial. The District Court suppressed the evidence. Judge Kennedy, writing for the majority, reversed the District Court and held that the defendant's rights were not violated. He concluded that the manager's inventorying of the cartons did not constitute a search by a government official (state action). He

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[5]The government did not appeal the issue of whether probable cause existed, so the Court based its decision on the assumption that probable cause did not exist.

[6]539 F.2d 1 (9th Cir. 1976).

also found that the manager's consensual transfer of the books to the FBI agents did not constitute a seizure. Because there was no search and seizure, the Fourth Amendment did not properly apply, and the evidence was admissible.

Such a decision protects the rights granted to a defendant by the Constitution. It does not however, unnecessarily expand the Constitution to afford protection against searches by private individuals. Legally sound decisions such as this are important to law enforcement officials, because they allow officers to take advantage of evidence discovered and presented to them by private citizens. Furthermore, such decisions prevent defendants from abusing the criminal justice system by attempting to exclude critical evidence obtained in a manner that caused them no harm other than to be caught in the commission of a crime.

On the issue of a defendant's Sixth Amendment right to confront witnesses, Judge Kennedy again authored a reasonable, common sense opinion that will greatly aid the prosecution of criminals. Barker v. Morris[7] involved two brutal murders committed by members of the Hell's Angels motorcycle group. Months after the crimes had been committed, a member of the group who had participated in the murders contacted the police. He described the murders and led police to the site where the bodies were hidden. This informant was dying of throat cancer and was expected to live only several weeks. Based on the information he

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[7]761 F.2d 1396 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986).

provided, three other members of the group were indicted and the informant testified against two of the defendants at their preliminary hearing. The third man was absent from the hearing because he had not yet been apprehended. Due to the informant's impending death, his preliminary hearing testimony was videotaped.

The informant died before the third man was apprehended and brought to trial. Judge Kennedy allowed the use of the prior videotaped testimony in the third man's trial even though the defendant had not been present at the preliminary hearing to cross-examine the informant. Judge Kennedy found that the Sixth Amendment Confrontation Clause had not been violated because the videotaped testimony had substantial and specific guarantees of trustworthiness and reliability. This decision prevented a brutal murderer from being released just because he was fortunate enough to have evaded apprehension until the informant died.

Judge Kennedy has also authored well-reasoned decisions in the areas of the Fifth Amendment protection from double jeopardy[8] and the Seventh Amendment right to a jury trial in a civil rights action.[9] In addition, Judge Kennedy has been willing to uphold severe punishment when a defendant's criminal

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[8]Adamson v. Ricketts, 789 F.2d (9th Cir. 1986) (Kennedy, J., dissenting), rev'd, ___ U.S. ___, 107 S.Ct. 2860 (1987).

[9]Darbin v. Nourse, 664 F.2d 1109 (9th Cir. 1981).

behavior so warrants. For example, in United States v. Stewart,[10] Judge Kennedy justifiably upheld a life sentence without bail against a drug dealer. The dealer had shown utter disregard for the law by expanding his drug sales operation while out on bail. In Neuschafer v. Whitley,[11] Judge Kennedy upheld a death sentence where it was clearly authorized by statute and all questions regarding admissibility of evidence had been correctly resolved by the lower courts.

Although Judge Kennedy is tough on criminals, he strives to do justice. His experience as a private attorney includes representing defendants in criminal actions, sometimes acting as a public defender. This background enables Judge Kennedy to exhibit "compassion, warmth, sensitivity and an unyielding insistence on justice", which are the attributes he considers every good judge to possess.[12]

Furthermore, because of Judge Kennedy's reasoned analyses, which includes strict adherence to precedent, his decisions often result in a finding in favor of the defendant. Where police officers clearly commit an illegal search, Judge Kennedy will not allow the resulting evidence to be introduced at trial even if it means the prosecution cannot obtain a convic-

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[10] 820 F.2d 1107 (9th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 192 (1987).

[11] 816 F.2d 1390 (9th Cir. 1987).

[12] N.Y. Times, Dec. 2, 1987.

tion. United States v. Boatwright.[13] Judge Kennedy is even willing to author a dissent in favor of a defendant when he believes the majority is interpreting a mens rea requirement too broadly. United States v. Jewell.[14]

Judge Kennedy has authorized over 400 decisions. Among those opinions are decisions that have been adverse to virtually every interest group of which we are aware. Judge Kennedy's decisions, however, are predicated upon the law as it is required to be applied. Therefore, his opinions are not skewed in favor of any particular interest group. Judge Kennedy has decided cases in favor of criminal defendants yet we believe that his decisions are fair. Judge Kennedy has decided cases in favor of plaintiffs suing police officers,[15] yet we believe his decisions are sound. Over the course of a career as extensive as Judge Kennedy's, he has undoubtedly been required to decide cases adversely to almost every interest group (including law enforcement). We believe, however, that Judge Kennedy's decisions are notable only in their adherence to the law, controlling precedent and the Constitution as written.

Judge Kennedy's background as an attorney in private practice, as a professor of Constitutional Law, and as a Judge on the Ninth Circuit Court of Appeals, has certainly provided him with the skills necessary to be an outstanding Supreme Court

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[13]822 F.2d 862 (9th Cir. 1987).

[14]532 F.2d 697 (9th Cir. 1976), cert. denied, 426 U.S. 951 (1976).

[15]McKenzie v. Lamb, 738 F.2d 1005 (9th Cir. 1984).

Justice. He is well-equipped to handle the numerous and sensitive criminal law issues facing the Supreme Court. His decisions in the criminal justice area faithfully adhere to precedent, address only the precise issues facing the court, exhibit a well-reasoned and common sense analysis of the law and facts, and end with a just result. Judge Kennedy has consistently and unceasingly served justice as a public servant. The Fraternal Order of Police strongly believes he will continue serving in an exemplary manner as an Associate Justice of the United States Supreme Court, and we therefore urge that his nomination be approved.

Thank you very much.

The CHAIRMAN. Thank you very much. I should note there have been others who were invited to testify but could not make it, and they will be forwarding their testimony, and also I ask unanimous consent that the revised testimony of Larry D. Thompson be entered in the record as if read.

[Revised testimony follows:]

REVISED TESTIMONY

STATEMENT OF LARRY D. THOMPSON
BEFORE UNITED STATES SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF ANTHONY M. KENNEDY

Mr. Chairman, distinguished members of the Committee, my name is Larry Thompson. I am a partner in the law firm of King and Spalding in Atlanta, Georgia. From 1982 to 1986 I was U.S. Attorney for the Northern District of Georgia.

I would like to begin by thanking you for the opportunity to appear today before you. It is a very great honor to testify before this distinguished Committee on behalf of the nomination of Judge Anthony M. Kennedy to the United States Supreme Court.

I would like to concentrate on the area of greatest concern to me as a former federal prosecutor--law enforcement. For the vast majority of American people, the courts are by far and away the most important aspect of our administration of justice. People care about the courts because legal decisions on criminal justice issues affect them most. Nothing has a more direct and profound effect on them, their families, their neighborhoods and communities than crime and the fear of crime.

For society as a whole, the stakes are also enormous. The future of our young people, our cities, and our poor and disadvantaged is quite literally in the balance. Every year, billions of dollars and thousands of lives are lost in what we call the "war on crime"--but what might perhaps better be called the war that crime wages on us.

We as a society have come to realize this threat. The President and the Congress have worked together to strengthen our criminal law enforcement in such areas as drug abuse, organized crime, and white-collar crime. As a former federal prosecutor, I can tell you that laws such as the Comprehensive Crime Control Act of 1984 are now playing an important role in this fight.

While much of law enforcement involves the state court systems, the role of federal courts is very important. No matter how good the laws you pass here, they must be enforced in federal court. And the United States Supreme Court plays the most important role of all. Approximately a third of its caseload is criminal. Its word is essentially final on federal statutes and on the constitutional constraints on both state and federal law enforcement.

In recent years, some federal court decisions, including some rendered by the Supreme Court, have in my view missed the mark on criminal justice issues and have displayed a lack of understanding of the realities and difficulties of effective and fair law enforcement. This lack of understanding can upset the balance in our criminal justice system between the rights of the accused and the rights of law abiding citizens.

For example, a few years ago, in Florida v. Rover, a majority of the Supreme Court affirmed a lower court decision which allowed evidence of drugs found in a drug courier's suitcase to be suppressed, in my view, on exceedingly technical grounds. That decision was handed down during my tenure as United States Attorney, and I had to administer its mandate in the context of

increased drug trafficking at Atlanta's Hartsfield Airport, the nation's largest. In Royer, members of the smuggling detail of the Dade County police had detained on suspicion of transporting narcotics a very nervous-looking man with two heavy suitcases at the Miami airport. Among many other telling details, they had just observed him buy his ticket to New York under an assumed name, paying from a large roll of small-denomination bills. They had asked him to accompany them to a nearby room adjacent to the main concourse, to get away from the flow of business at the airport. Once there they had asked him to consent to a search of the luggage. Without replying, he got out a key to one suitcase and unlocked it, revealing marijuana. When he had explained that he couldn't open the other suitcase, he consented to the police prying it open. All told, 65 pounds of marijuana were found. The entire episode had lasted about fifteen minutes.

The majority held that the defendant's questioning in the adjacent room converted the encounter into an unlawful detention and tainted his consent to the search of his luggage. Justice Rehnquist had this to say about the events:

> "The opinion...betrays a mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on, than to those who are seeking to administer a system of justice whose twin purposes are the conviction of the guilty and the vindication of the innocent....Analyzed simply in terms of its 'reasonableness,' as that term is used in the Fourth Amendment, the conduct of the investigating officers toward

> Royer would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of this Court's Fourth Amendment jurisprudence....Would it have been more 'reasonable' to interrogate [the defendant] about the contents of his suitcases, and to seek his permission to open the suitcases when they were retrieved, in the busy main concourse of the Miami Airport...? If the room had been large and spacious, rather than small, if it had possessed three chairs rather than two, would the officers' conduct have been made reasonable by these facts? . . . All of this in my mind adds up to little more than saying that if my aunt were a man, she would be my uncle. The officers might have taken different steps than they did to investigate Royer, but the same may be said of virtually every investigative encounter that has more than one step to it."

Justice Blackmun had this to say about the police officers' encounter with the drug courier:

> "In my view the police conduct in this case was minimally intrusive. . . . The special need for flexibility in recovering illicit drug couriers is hardly debatable. . . . In light of the extraordinary and well-documented difficulty of identifying drug couriers, the minimal intrusion in this case, based on particularized suspicion, was eminently reasonable."

As a former federal prosecutor, I admit that I sympathize with these points of view. The burden placed on effective law enforcement by seemingly hypertechnical rulings turning on sizes

of rooms and shapes of parcels is incalculable. It is not simply that the obviously guilty individual defendants go free. Equally serious is the burden placed on future police conduct by the complete absence of predictability or reasonableness in some areas of criminal law. It seems that we are sometimes requiring policemen and other law enforcement officials in the field to know what judges themselves do not yet know, and indeed cannot agree upon.

I have reviewed several of Judge Kennedy's major criminal law cases and speeches, and I feel confident as a result that he understands this perspective, and is deeply committed to a criminal justice system that is fair to both defendants and society.

Judge Kennedy has shown that he understands the magnitude of the problems we face. In 1984 he stated that "[t]he constitutional order is under tremendous attack by criminal conspiracies that operate and profit from sale of illegal drugs....hundreds of millions of dollars from illegal drug transactions are surging through the economy....[These] [i]llegal profits can unravel the social fabric through corruption. Millions of dollars in cash are now available to bribe law enforcement officers, legislators, and judges." He urged his audience to help "make our public aware of the physical dangers of drug use and of the danger to the body politic from corruption by drug profits. Neither can be tolerated in a free society."

Judge Kennedy's decisions clearly show his understanding of criminal law realities. In Darbin v. Nourse, for example, he

made it clear that he does not accept any 'moral equivalence' between law enforcement officers and criminals:

> "Were a juror to announce that most law officers, by reason of their profession and their oath, are trustworthy and honest, but that similar respect cannot be accorded to prisoners, I should be gratified, not shocked. Those principles are consistent with a responsible citizenship and are not a grounds to challenge the juror for cause." Darbin v. Nourse, 664 F.2d 1109 (9th Cir. 1981).

Judge Kennedy again showed this understanding of realities in the celebrated case of United States v. Leon. In that case, the United States Supreme Court created a new "good faith" exception to the exclusionary rule, where law officers rely in good faith on a search warrant that later is judged illegal. The Court decided this case assuming arguendo that the warrant in Leon was legally defective, because that issue had not been appealed or argued. Judge Kennedy's dissenting opinion below did not rest on a good faith exception, because--as the Supreme Court recognized in its opinion--a lower court judge was not well placed to create a major new doctrine. Instead, he argued that the warrant was valid: "The affidavit for the search warrant sets forth the details of a police investigation conducted with care, diligence, and good faith....One does not have to read many cases involving illegal drug traffic before it becomes clear exactly what was going on at the residences described by the officer's affidavit....Whatever the merits of the exclusionary rule, its rigidities become compounded unacceptably when courts presume

innocent conduct when the only common sense explanation for it is on-going criminal activity."

I think this opinion epitomizes Judge Kennedy's practicality and realism. I also think it is impressive that one of the Supreme Court dissenters in Leon, Justice Stevens, would have remanded that case to Judge Kennedy's court because he thought that that court would now agree with Judge Kennedy's "strong dissent" in light of intervening Supreme Court precedent. 468 U.S. at 961.

In conclusion, Mr. Chairman, I want simply to say that my admittedly limited knowledge of Judge Kennedy's record has led me to conclude that he would be a truly outstanding Justice of the Supreme Court. I believe that his outlook on criminal law is fundamentally in tune with the developing consensus on the Court and in society, and that he will help safeguard and advance our recent progress in the war on crime.

The CHAIRMAN. Now, gentleman, it is always a pleasure to have your input, sometimes more of a pleasure than others. In this case you have a record which you could speak to. The last time you all testified, the judge for whom you testified—which was your right, and you did it eloquently—had hardly decided any criminal law cases, had never written about it, hardly spoken to it, knew nothing, had indicated himself he did not take much interest in as an academic nor have opportunity to as a judge, speak to any criminal-law issues.

But in this case we have a judge who in fact has probably decided a couple hundred, 130 criminal cases. And I think your testimony is particularly important because he has made some decisions, and I am sure the police officers in the community which the decision affected were very angry, and I think, Dewey, your testimony is particularly relevant when you point out that he has been balanced. And I think this should be evidence of the fact that you do not ask for purity, you do not ask for someone who agrees with you all the time.

This is a man who you believe, though, on balance, is fair-minded, and cognizant of the rights of victims as well as the criminal, and I, having looked at a summary of all of his criminal-law cases, I tend to agree with you.

I have only one question, if I can find it here, and that is with regard to the exclusionary rule. Is it your view that Judge Kennedy believes that there should be no exclusionary rule, or that he thinks it should be modified?

Mr. STOKES. Are you asking——

The CHAIRMAN. I will start with you, Dewey, first, and then work our way down.

Mr. STOKES. I think in his opinions that he expressed, that the exclusionary rule should be modified, not necessarily done away with. I think he understands that the exclusionary rule is a check-and-balance system. There is none of us pure as driven snow that does not need a check and balance, and I think that is what the exclusionary rule really does.

Mr. VAUGHN. Nothing I have seen indicates to me that Judge Kennedy would support the abolition of the exclusionary rule, but rather, a common-sense interpretation, and the good-faith exception that reasonable people could arrive at based on a review of the facts.

The CHAIRMAN. Thank you. Mr. Hughes?

Mr. HUGHES. I would agree with my two counterparts. I could not add any more. I alluded to that in my testimony on the exclusionary rule. I just think it is overdone, in some instances.

The CHAIRMAN. Thank you very much. I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

I think we are very fortunate to have the able representatives from these law-enforcement organizations here. Mr. John Hughes, executive director of National Troopers Coalition; Mr. Gerald Vaughn, executive director of International Association of Chiefs of Police; and Mr. Dewey R. Stokes, national president, Fraternal Order of Police.

We have had you all testify before when judges were up, and you have done a fine job. I want to commend you. I want to commend you for studying the records of these people. There is nothing more important than protecting the public, and that is what you do. Law-enforcement people protect the public.

I just attended a funeral this afternoon of J.P. Strom, a cousin of mine, who was the chief of the South Carolina Law Enforcement Division, the top law enforcement in our State, and I know the good work you all do.

I am in touch with our State highway patrol, and State officers, and others, and there is no group of people I have more respect for than law-enforcement people. Just as our soldiers protect us against external enemies, you all protect us against the internal enemy, the criminal, and it would be a terrible situation in which to live, if it were not for the able, dedicated efforts of the law-enforcement officers.

Now I just wanted to say that there are several who cannot be here and testify, for one reason or another. The schedule was changed, and maybe some of them could not come for that reason, or others could not come for other reasons.

Mr. Robert R. Fuesel, president of the Federal Criminal Investigators Association. Mr. Cary Bittick, executive director of the National Sheriffs Association. Mr. John J. Bellizzi, executive director of the National Narcotics Enforcement Officers Assoication.

[The aforementioned statements follow:]

Federal Criminal Investigators Association
Office of National President
Post Office Box A3867
Chicago, Illinois 60690

Robert R. Fuesel
National President

TESTIMONY OF ROBERT R. FUESEL, NATIONAL PRESIDENT,
FEDERAL CRIMINAL INVESTIGATORS ASSOCIATION
BEFORE THE SENATE JUDICIARY COMMITTEE
REGARDING THE CONFIRMATION OF JUDGE ANTHONY KENNEDY
TO THE UNITED STATES SUPREME COURT

THANK YOU MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE; MY NAME IS ROBERT FUESEL. I AM THE NATIONAL PRESIDENT OF THE FEDERAL CRIMINAL INVESTIGATORS ASSOCIATION AND A MEMBER OF THE NATIONAL LAW ENFORCEMENT COUNCIL.

THE FCIA IS MADE UP OF AGENTS REPRESENTING MORE THAN 50 FEDERAL LAW ENFORCEMENT AGENCIES THROUGHOUT THE UNITED STATES. THE PRIMARY GOAL OF THE ASSOCIATION IS TO REPRESENT THE VIEWS OF THOSE PROFESSIONALS WHO COMPRISE THE FEDERAL LAW ENFORCEMENT COMMUNITY. WITH THAT IN MIND, WE SUPPORT THOSE INDIVIDUALS WHO ASSIST US IN OBTAINING OUR GOAL. THEREFORE, THE FCIA SUPPORTS THE EFFORTS OF THOSE JURISTS WHO BY THEIR DECISIONS, SUPPORT THE EFFORTS OF FEDERAL LAW ENFORCEMENT AGENTS IN THEIR FIGHT AGAINST THE CRIMINAL ELEMENT. IT IS WITH THAT PURPOSE IN MIND THAT THE EXECUTIVE BOARD, ACTING ON BEHALF OF THE GENERAL MEMBERSHIP OF THE FCIA, WISHES TO PLACE ON THE RECORD ITS HEARTY AND UNQUALIFIED ENDORSEMENT OF JUDGE ANTHONY KENNEDY TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

WE SINCERELY FEEL THAT OUR ASSOCIATION'S GOALS FOR LAW ENFORCEMENT WILL BE ADVANCED SUBSTANTIALLY BY THE CONFIRMATION OF JUDGE KENNEDY AS AN ASSOCIATE JUSTICE OF THE SUPREME COURT FOR THE FOLLOWING REASONS:

1. HIS PERSONAL HONOR AND INTEGRITY, WHICH HE POSSESSES TO THE HIGHEST DEGREE, AND HAS DEMONSTRATED CONSISTENTLY IN PUBLIC AND PRIVATE LIFE;

2. HIS DEDICATION TO VIGOROUS ENFORCEMENT, WITHIN CONSTITUTIONAL BOUNDARIES, OF THE CRIMINAL LAWS OF THE UNITED STATES, AS EVIDENCED BY HIS LONG AND DISTINGUISHED RECORD OF SERVICE ON THE APPELLATE BENCH; AND

3. LIKE OTHERS WE BELIEVE THAT THROUGHOUT HIS CAREER, JUDGE KENNEDY HAS DEMONSTRATED A REAL CONCERN FOR THE PROBLEMS OF LAWLESSNESS AND VIOLENCE IN OUR SOCIETY, AND A MARKED SENSITIVITY TO THE CONCERNS FACING TODAY'S LAW ENFORCEMENT PROFESSIONALS.

WE RESPECTFULLY SUGGEST THAT JUDGE KENNEDY WILL BRING TO THE SUPREME COURT HIS EXTENSIVE KNOWLEDGE AND LEGAL EXPERIENCE. HE IS KNOWN TO HAVE BALANCED VIEWS ON

CRIMINAL JUSTICE AND A COMMITMENT TO THE RULE OF THE LAW. JUDGE KENNEDY'S VIEWS ON CRIMINAL JUSTICE ISSUES HAVE EARNED HIM A REPUTATION FOR FAIRNESS, OPEN-MINDEDNESS AND SCHOLARSHIP AND ARE IN ACCORD WITH THE VIEWS OF OUR GENERAL MEMBERSHIP.

THIS ENDORSEMENT IS BASED UPON THE COLLECTIVE EXPERIENCE OF THOSE CRIMINAL INVESTIGATORS WHO ARE CHARGED WITH THE RESPONSIBILITY FOR ENFORCING OUR NATION'S LAWS. YOU HERE TODAY ALL KNOW THE TYPE OF DEDICATED CRIMINAL INVESTIGATORS OF WHOM I SPEAK. THEY ARE THE MEN AND WOMEN WHO SPEND THEIR ENTIRE WORKING DAYS AND NIGHTS IN THE STREETS OF OUR GREAT COUNTRY ON BEHALF OF THE AMERICAN PEOPLE, WORKING AGAINST THOSE WHO ARE BENT ON CRIMINAL ACTIVITIES. WE KNOW THAT ALL OF YOU HERE TODAY SUPPORT THE DAILY ENFORCEMENT EFFORTS OF THESE AGENTS. LEST THERE BE ANY DOUBT, WE ARE BEFORE YOU NOW TO STATE UNEQUIVOCALLY THAT THOSE AGENTS SUPPORT FULLY THE NOMINATION OF JUDGE KENNEDY.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, WE ARE MAKING THIS ENDORSEMENT BECAUSE WE SINCERELY BELIEVE, BASED ON OUR EXPERIENCE AND JUDGE KENNEDY'S RECORD, THAT HIS CONFIRMATION TO THE SUPREME COURT WOULD BE OF BENEFIT NOT ONLY TO THE FEDERAL ENFORCEMENT EFFORT, BUT TO THE ENTIRE LAW ENFORCEMENT COMMUNITY OF THE UNITED STATES. THANK YOU.

Sheriff Dwight E. Radcliff
President
Circleville, Ohio

L. Cary Bittick
Executive Director
Alexandria, Virginia

NATIONAL SHERIFFS' ASSOCIATION

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General Counsel
Washington, DC

TESTIMONY

OF

L. CARY BITTICK
EXECUTIVE DIRECTOR
NATIONAL SHERIFFS' ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

on

THE NOMINATION OF JUDGE KENNEDY
FOR ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT

December 17, 1987

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Chairman Biden and Members of the Committee:

Thank you for inviting the National Sheriffs' Association to address you on the nomination of Judge Kennedy to be an Associate Justice of the United States Supreme Court.

Let me provide you with some background information about myself and about the National Sheriffs' Association before outlining the reasons we recommend that you confirm Judge Kennedy to this important position.

My name is L. Cary Bittick. I am the Executive Director of the National Sheriffs' Association. Prior to this appointment, I was the Sheriff of Monroe County, Georgia for 22 years.

I am here today to represent the National Sheriffs' Association and its 35,000 members. Our membership includes the nations 3,100 sheriffs, their deputies and other criminal justice practitioners. The National Sheriffs' Association was first incorporated in 1940 as a nonprofit organization. We actively work to increase the professionalism of law enforcement and corrections officers, to seek new ways to reduce crime, and to increase crime prevention efforts.

As you know, sheriffs in most parts of the country have a variety of duties. In most jurisdictions, sheriffs have several responsibilities in the criminal justice system -- including law enforcement and the administration of our jails. Because of the sheriff's role in enforcing the law and administering the jails, there are many occasions where the sheriff's job is directly impacted by the actions of the United States Supreme Court. Each of us in law enforcement can recite examples in our communities, where criminals have gone free because of technicalities. In our view, an overriding problem for law enforcement throughout the United States has been the courts -- on the federal, state and local level.

In our view, the courts have repeatedly overstepped their authority in criminal cases; they have legislated new rights for criminals and set up impediments in the search for truth. We are anxious to see this trend reversed. We look forward to a court system that puts the meaning of "justice" back into the phrase "criminal justice system."

Because of the critical role that the court plays in our criminal justice system, I have requested to speak to you about Judge Kennedy.

I am pleased to tell you that everything I have heard about Judge Kennedy from our members is positive and the National Sheriffs' Association urges you to confirm his nomination.

The National Sheriffs' Association supports Judge Kennedy for a variety of reasons which I will outline for you:

1. His educational and professional background eminently qualify him for this position. For example, Judge Kennedy:

- o graduated from Stanford University in 1958; he was a member of Phi Beta Kappa; and he received his law degree, cum laude from Harvard University in 1961;

- o he was in private practice as an associate with the firm of Thelen, Marrin, Johnson and Bridges; a sole practitioner; and a partner with the firm of Evans, Jackson, and Kennedy;

- o in 1975, he was appointed to sit on the United States Court of Appeals for the Ninth Circuit; a position he currently holds;

- he has taught constitutional law part-time at the McGeorge School of Law, University of the Pacific, since 1965.

In our opinion, Judge Kennedy's various professional positions and achievements make him superbly well qualified to serve on the United States Supreme Court. He has been in private practice, the educational field, and served in the judicial branch of government. In each position he has served with distinction.

2. We believe that Judge Kennedy's judicial philosophy is sound and we support his common sense approach in reviewing criminal cases. Let me cite two examples of what I mean:

(a) In Adamson v. Ricketts, Judge Kennedy dissented from the majority's holding overturning the death penalty for the man who confessed to the murder of Arizona Republic reporter Don Bolles. The majority reversed the conviction holding that Arizona officials violated the defendants double-jeopardy rights. When the defendant violated the terms of his plea-bargain agreement, by which he was convicted of second-degree murder, the state tried him for first degree murder. In a strongly

worded dissent, Judge Kennedy called the majority's holding "artificial" and said that "it gives the defendant a windfall . . . in what should have been a simple case of the making of a bargain and the failure to keep it."

(b) In another case, United States v. Leon, Judge Kennedy dissented from the majority's holding, which affirmed the suppression of evidence in a drug case and refused to recognize a "good faith" exception to the exclusionary rule where police officers act in reasonable reliance on a search warrant which is later found to be invalid. In his dissent, Judge Kennedy stated "one does not have to read many cases involving illegal drug traffic before it becomes clear exactly what was going on at the residences described by the officers affidavit. . . whatever the merits of the exclusionary rule; its rigidities become compounded unacceptably when courts presume innocent conduct when the only common-sense explanation for it is on-going criminal activity."

In our view, this common-sense approach is a good one that will help restore a proper balance to our criminal justice system.

3. During Judge Kennedy's tenure on the Ninth Circuit Court of Appeals he has demonstrated a commitment to see that justice is carried out. In the cases that he has reviewed he has supported several concepts important to us as law enforcement officers: the death penalty and a "good faith" exception to the exclusionary rule.

(a) In Neuschafer v. Whitley, Judge Kennedy upheld the death sentence of a Nevada prison inmate convicted of strangling another inmate while serving a life-without-parole term for the rapes and murders of two teenagers. He wrote that there was "no valid constitutional or federal objection to the imposition of the capital sentence" on the defendant.

(b) In the United States v. Leon, which I discussed previously, Judge Kennedy's dissent from the majority opinion later was the basis for a Supreme Court reversal. Judge Kennedy's position in the Leon case also provides the basis of President Reagan's proposal for exclusionary rule reform.

We concur with Judge Kennedy's reasoning in these cases and agree with his support of the death penalty and a "good faith" exception to the exclusionary rule.

Mr. Chairman, Members of the Committee:

In conclusion, I would like to quote President Reagan when he stated, "It's time we reassert that the fundamental principle and purpose of criminal justice is to find the truth and not to coddle criminals." We believe that President Reagan's desire to put some justice back in the justice system would be best served by the appointment of Judge Kennedy to the United States Supreme Court.

Again, thank you for the opportunity to speak to you.

International Narcotic Enforcement Officers Association, Inc.

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ALBANY, NEW YORK 12207 U.S.A.

JOHN J. BELLIZZI
EXECUTIVE DIRECTOR

December 17, 1987

Senator Joseph R. Biden, Jr.
Chairman of the U.S. Senate
Committee on the Judiciary
Washington, DC 20510

Dear Senator Biden:

Due to a change in scheduling of the apperance of the National Law Enforcement Council panel before your committee, I was not able to be present to submit my testimony on behalf of Judge Anthony M. Kennedy.

Enclosed is a copy of the testimony I was to submit. It is respectfully requested that this be included in the record.

Sincerely,

John J. Bellizzi
Executive Director

JJB/vlc

Enc.

TESTIMONY PRESENTED BY

JOHN J. BELLIZZI
EXECUTIVE DIRECTOR
INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION

BEFORE THE SENATE JUDICIARY COMMITTEE

CONSIDERING THE NOMINATION OF

JUDGE ANTHONY KENNEDY

AS JUSTICE OF THE SUPREME COURT

As in my previous appearance before this committee, I wish to express my appreciation for granting me the opportunity to appear before you today to testify in these important hearings considering the nomination of Judge Anthony M. Kennedy.

My name is John J. Bellizzi. Currently I serve as the Executive Director of the International Narcotic Enforcement Officers Association (INEOA) which is an organization composed basically of narcotic enforcement officers from all levels of government and from throughout the United States and 50 other countries.

I appear here today on behalf of 10,000 members and thousands of other drug enforcement officials throughout the United States.

Recently drug traffickers have suffered some serious setbacks as a result of an intensified and concentrated effort by law enforcement.

The impact of the multitude of seizures of drugs, money and other assets brought about by successful investigations, arrests and prosecutions has put such a dent in the illegal trafficking operations that by furious retaliation the traffickers are committing assaults, violence and murder on our drug agents and other officials responsible for drug enforcement.

The DEA reports 144 assaults on agents during the past two years compared with 50 in 1983 and 1984. During 1986, 96 law enforcement officers were killed in the line of duty, 66 died as a result of gunshot wounds. Since 12/31/86, three federal agents have been killed during drug investigations. Seized last year were 400 automatic weapons including submachine guns. According to John C. Lawn, Administrator of DEA, the situation is considered a very dangerous trend.

A recent extradition by the United States from Columbia of the top Columbian drug dealer, Carlos Lehder Rivas, who has been identified as one of the most dangerous and successful drug traffickers, has magnified the high risk imposed on our drug law enforcement agents. Fearing

reprisals from the arrests of Lehder, DEA's administrator, John C. Lawn, has notified all DEA agents in the United States and in the 43 DEA offices around the world to exercise an advanced state of readiness for themselves and their families. Lehder is alleged to have threatened to kill a federal judge each week until he is freed. The "Medallian Cartel", allegedly headed by Lehder, has pledged to kill five Americans for every extradition by Columbia.

Narcotic law enforcement agents have always operated under high risk conditions, but recent events have created a situation where their lives are at stake constantly and these men and women deserve to be recognized for their dedicated service.

The thousands of drug enforcement agents who risk their lives each time they set out on a drug investigation are dedicated. Notwithstanding the imminent risk they face, they are not the least dissuaded from performance of duty.

These officers and their family members are very much concerned that they receive the same equal protection, the same constitutional rights, the same constitutional protection afforded to any suspect, defendant or prisoner charged with the commission of the crime.

I wish to make it clear that by this endorsement we do not seek to ingratiate ourselves with Judge Kennedy or the court. We seek no favor, we seek no special privileges. What we do seek is protection of the constitutional rights of the accused and we also seek protection of the constitutional rights of our law-abiding citizens and of our law enforcement agents.

I submit that by his record Judge Kennedy has demonstrated that he is capable and indeed willing to do just that - ensure equal protection to all regardless of race, color, sex, religious or social background.

The matter of Judge Kennedy's nomination and record was reviewed by the 50 members of the Board of Directors of INEOA representing the general membership.

The board has found that Judge Kennedy is an outstanding nominee for the Supreme Court. His impressive career spans the better part of three decades.

Judge Kennedy received a unanimous "qualified" rating from the American Bar Association when he was nominated for the court at age 38 by President Ford. In 1975, the Senate unanimously confirmed Judge Kennedy for U.S. Court of Appeals.

Judge Kennedy has served with distinction on the Ninth Circuit Court of Appeals since 1975.

The American Bar Association on December 8th announced that its 15 member Standing Committee on the Federal Judiciary rated Judge Kennedy "well qualified" which, as you know, is reserved for those who meet the highest standards of professional competence, judicial temperment and integrity. The person in this category must be among the best available for appointment to the Supreme Court according to ABA standards.

He has participated in over 1,200 decisions on the Ninth Circuit Court of Appeals since 1975 and is now among the most senior active judges on that court. He has authored over 400 opinions. "In that time", President Reagan has said, "he's earned a reputation as a courageous, tough, but fair jurist."

Throughout his career on the bench, Judge Kennedy has faithfully applied the Constitution and the criminal law in a manner that recognized a balance between society's need to protect innocent victims and the procedural rights of defendants.

Judge Kennedy's decisions reflect his belief that law enforcement activities must be reasonable and that the right of a criminal defendant

under the Constitution to receive a fair trial must be protected vigorously.

However, his judicial decisions likewise reflect his firm committment to vindicating the victims of crime and protecting the rights of society from vicious criminals.

In Judge Kennedy's view, mistakes by law enforcement officers that do not represent willful misconduct and do not affect the fairness of a defendant's trial are not grounds for releasing criminals to renew their war on society. In one of the most important criminal law cases of this decade, the Supreme Court agreed with Judge Kennedy that a "good-faith exception" to the exclusionary rule should be recognized in certain circumstances. Judge Kennedy had argued in a dissenting opinion that evidence in a drug case should not have been suppressed where the police officers had acted in good faith and had reasonably relied upon a search warrant, issued by an impartial magistrate, that was later found to be invalid (U.S. v. Leon, 1983).

Supreme Court decision will have a vital impact on the success of the Nation's crusade against illegal drugs. Judge Kennedy has issued a number of rulings that are likely to be critical in our efforts to counter illegal drug trafficking.

Judge Kennedy has upheld tough sentences against drug dealers. He upheld a life sentence without parole for a drug manufacturer and dealer. Although the conviction was for a first offense, Judge Kennedy noted the defendant had expanded his drug manufacturing operations while free on bail, directed the operation from his jail cell after his bail was revoked, and shown no remorse for his crimes. Judge Kennedy upheld the maximum sentence imposed by the lower court (U.S. v. Stewart, 1987).

International cooperation is essential in combatting international drug cartels, and in U.S. v. Peterson (1987), Judge Kennedy held that American officials may assume the constitutional validity of the actions of foreign governments cooperating in anti-drug ventures. Judge Kennedy affirmed a conviction obtained on the basis of evidence received from Phillipine narcotics agents with whom American law enforcement officials were acting in a joint anti-drug venture.

After careful consideration, the 50 member Board of Directors, representing the general membership of INEOA, unanimously endorsed and supports the nomination of Judge Anthony M. Kennedy as Justice to the United States Supreme Court.

We urge this committee to vote favorably on the nomination of Judge Kennedy.

- Thank You -

John J. Bellizzi of Delmar, New York retired from the position of Director of the New York Bureau of Narcotic Enforcement and has assumed the position of Executive Director of the International Narcotic Enforcement Officers Association on a full-time basis.

Bellizzi retired after 40 years of service in law enforcement having worked under six governors and numerous commissioners and other state officials. He began his law enforcement career as a police officer with the New York City Police Department with assignments in the "Fort Apache" section of the Bronx, the "Harlem" area of Manhattan and the "Bedford-Stuyvesant" area of Brooklyn. During the war, he served with the Division of National Defense as an undercover agent investigating communist activites. Prior to entering the field of law enforcement, he served as a licensed Pharmacist in retail and hospital pharmacies.

Bellizzi holds degrees from St. John's University, College of Pharmacy, Ph.G.; Albany Law School, LL.B., Doctor in Jurispurdence, JD., Union University; and Honorary Doctorate of Laws LL.D., St. John's University; and has done graduate study in U.S. Food and Drug Law at New York University Law School and Fordham University. The author of many articles on pharmacy, narcotics and law, he has served on several faculties including Albany Medical School and the University of Southern California. He was Professor of Pharmaceutical Law at St. John's University for 14 years. In addition, he has served as consultant to the White House on Narcotics and Drug Abuse, as a member of New York City Mayor Wagner's and Mayor Lindsay's Narcotic Commission; on Los Angeles Mayor Yorty's Narcotic Commission, and as a member of Governor Brown's Narcotic Task Committee for the State of California. He has

served as the Executive Director of the New York State Drug Abuse Advisory Committee of the New York State Department of Health and the Division of Substance Abuse. He is currently serving as a member of the New York State Drug Abuse Advisory Committee.

Mr. Bellizzi was the founder and First President of INEOA. He is a recipient of many awards including the Honor Legion Medal from the N.Y.C. Police Department and the Papal Medal from Pope Paul IV. He received the first Anslinger Award given to an active narcotic officer for outstanding dedication, achievement, and contribution in combatting international drug trafficking.

Senator THURMOND. Mr. Fred L. Foreman, president-elect, National District Attorneys Association. Mr. Larry Thompson, former U.S. Attorney of Atlanta, Georgia.

And Mr. Chairman, I believe you spoke of Mr. Thompson's statement going in the record. If any of those others who are not here, if you would not object to putting their statements in the record——

The CHAIRMAN. Yes. I thought I had already indicated that, but all their testimony will be placed in the record. I understand they do have testimony they wish to have entered in the record.

Senator THURMOND. Also, I see Mr. Don Baldwin out there. Mr. Don Baldwin is the executive director of the National Law Enforcement Council. He has given fine cooperation to our committee. I have conferred with him a number of times. I have great confidence in him and I appreciate his presence, although he did not testify here today.

So I just want you all to know that we deeply appreciate the interest you take in helping his committee in the matter of the judges. I think probably that ought to be the first consideration in selecting a judge, is whether or not he really believes in law enforcement; whether or not he will, without fail, favor, take steps to punish the criminal. And so I am very pleased that you are here to testify.

Now, from all the evidence that you have heard at the hearing of Judge Kennedy, and the American Bar Association recommendation that he does possess integrity, judicial temperament, and professional competence, are you confident—I assume from what you have said that you feel he should be confirmed by this committee and the Senate.

Is the correct, Mr. Stokes?

Mr. STOKES. That is correct, Senator. I see no reason why not.

Senator THURMOND. Is that correct, Mr. Vaughn?

Mr. VAUGHN. That is absoutely correct, Senator.

Senator THURMOND. Is that correct, Mr. Hughes?

Mr. HUGHES. Yes, sir, Senator Thurmond, and thank you for your fine comments.

Senator THURMOND. I think that is all I have to say. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. The Senator from Alabama.

Senator HEFLIN. Well, I would like to concur in what Senator Thurmond has said about law enforcement, and include Mr. Don Bowen who is here, who does a great job of representating the various elements of the law-enforcement groups that are here, and over the country, and he represents them well here.

I, in regards to the criminal-law aspect of it, I was particularly struck by a speech that Judge Kennedy made on the rights of victims, that he made in March of this year to the South Pacific Judicial Conference in Auckland, New Zealand, and during my questioning I questioned him about that.

He goes into a great number of things that can be done to improve the victims' rights, and it is something that I think all law-enforcement officers would like to see, and maybe it can be made available to them, at least in a synopsis form, if not the full text.

So I thank you for your testimony, and we thank you for your input in all matters that come up before the Judiciary Committee in which you have an interest.

The CHAIRMAN. The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman. Just a question or two. I appreciate the testimony, especially the emphasis on the balance necessary, and I do believe that Judge Kennedy has approached it in that manner.

We have discussed in the course of the past several days cases where he has found the State, liberalizing the introduction of evidence. The *Leon* case, which led to the good-faith exception to the exclusionary rule, and, also cases where he has found against the State, in the Oregon case, perhaps went a little too far, even, on defendants' rights.

He did testify about three specific cases, and I would like to ask each of you about the cases.

He testified about the exclusionary rule, *Mapp* v. *Ohio*, and he said he felt it was a rule which ought to be retained.

Mr. Stokes, do you think that law enforcement has accommodated to *Mapp* v. *Ohio*, the exclusionary rule, in the 26 years it has been in effect, since handed down in 1961?

Mr. STOKES. Well, I think in the *Miranda*, as you covered——

Senator SPECTER. No, no. I am on *Mapp* right now.

Mr. Stokes. Oh, okay, on the exclusionary.

Senator SPECTER. Well, take *Miranda*, if you like, and I will give Mr. Vaughn *Mapp*.

Mr. STOKES. In the *Miranda* case, I think it is safe to say that everybody knows the content, and knows their rights under *Miranda*. Every police officer has been educated, reeducated. I think it is even in high-school law, maybe down as low as grade-school law, now, that each individual, each defendant has those rights. I think some cases, the criminal element, whether it is the elite, as you talked about earlier, or down to the street criminal, knows that he, or she, has to be provided their *Miranda* rights. The face is, I think that is how it evolved, was out of a traffic stop, when it was extended down to the very minute criminal element.

I think it is over-used, or over-extended. It has been carried a little bit further than its intial intent, but again, I think as we professionalize and educate police officers throughout this country, which we have been at before *Miranda* and since *Miranda*, and since some of the other exclusionary, and now the other rules, police officers are functioning in a very professional manner.

I do not think it needs to be carried any further.

Senator SEPCTER. Mr. Vaughn, how about the exclusionary rule in *Mapp* v. *Ohio?* Have law-enforcement officials pretty well accommodated to it, so that it is appropriate, in your judgment, to retain it?

Mr. VAUGHN. Well, I think certainly it has been around long enough that we are certainly used to it. I think law-enforcement, at least to my knowledge, and particularly the IACP, would not support an effort to have the exclusionary rule tossed out completely.

Our concern lies primarily in two areas. One is that the sanctions imposed for what may have been misconduct really do not affect the officer who may have engaged in the conduct. The people

who are most hurt by it are innocent citizens. In many cases, criminals continually engage in criminal conduct and then are right back out on the street.

We do support meaningful sanctions that would discourage inappropriate or illegal police activity, and ensure that constitutional protections against unreasonable search and seizure be protected.

So that is our concern, the practical effect of the exclusionary rule. Secondly, in many cases, the inability or lack of willingness of the courts to apply common sense, or a good-faith exception when officers acted reasonably, appropriately, and based on that good faith. This has had a harmful effect on seciety at large.

I would like to speak to *Miranda*, with your permission, for a moment.

I do not think the International Association of Chiefs of Police at least would support throwing *Miranda* out, either. Our concern, however, has been—if in fact the intent of *Miranda* is to ensure the protection of the rights of the accused—that since the time *Miranda* was handed down, there have been advances in technology, and increased levels of training, and minimum standards have been implemented throughout the States. Perhaps a review of *Miranda*, in the context of the times in which we live today may be appropriate, to ensure that given that technology available, and everything else, maybe the very intent of *Miranda* in protecting people's rights could be better achieved by other means available to us today.

But we would not support any effort to throw *Miranda* out.

Senator SPECTER. Well, the other question I will not ask because my time is up. The case that Judge Kennedy referred to, on *Gideon* v. *Wainwright* on right to counsel. But he has testified, in very forceful terms, about his recognition of the Bill of Rights, and the expansion, by judicial remedy, of counsel in the *Gideon* case, and exclusionary rule, and *Mapp*, and confessions in *Miranda*.

And I think it is a tribute to law-enforcement officials that you gentlemen are here this evening at this later hour, and that you testify with such balance and such concern for an appropriate balance, recognizing defendants' rights and recognizing society's rights.

Thank you very much, gentlemen. Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Senator Specter.

The CHAIRMAN. You look like you want to say something else, Mr. Vaughn.

Mr. VAUGHN. I do.

The CHAIRMAN. I have known you well enough now to know you would like to. Go ahead. I can tell. I am happy to hear what you have to say.

Mr. VAUGHN. I would just like to convey to Senator Thurmond our condolences, not only as an association, for the loss of one of the strongest members of IACP, and not only the head of law enforcement in your State, but a personnal relative, and I would convey our condolences to you, and express to your our sense of loss as well.

The CHAIRMAN. That is very nice of you. Well, gentlemen, thanks again. Your testimony was welcome and useful, and we appreciate your coming at this later hour in the day. Thank you.

Mr. HUGHES. Thank you.

The CHAIRMAN. Now I say to my colleagues on the panel here, on the Judiciary Committee, that there are at this moment no more public witnesses.

We will not vote on this nomination until shortly after resuming the Senate session when you all can—you are welcome to stay and listen to our business, but you are also free to go. Thank you.

We will vote shortly after we return. We will be back on the 25th, and it would be my intention to schedule an executive committee meeting shortly after that time, as is appropriate, when we know we are all going to be here. And we will keep the record open between now and the time we return, for any additional testimony that any of our colleagues, or any public witnesses would like to put in.

I indicated to Judge Kennedy that I have some questions that I will submit to him in writing, and any of my coleagues who may have them also, may have questions. I do not have, at this moment, any intention of asking Judge Kennedy to come back, but the committee reserves the right to do that, and I would expect, after having spoken to the leader, Senator Byrd, that shortly after we vote, assuming we vote favorably—or unfavorably, because it is still my intention, regardless, that the full Senate get a chance to vote on this—that there will be a scheduled vote in the Senate, I am told, as shortly thereafer as Senate business permits.

I thank my colleagues for their attendance, and all those witnesses who have appeared, and the Committee stands in recess at the call of the Chair.

Senator THURMOND. Could I say a word?

The CHAIRMAN. Yes. Sure you can, Senator.

Senator THURMOND. Mr. Chairman, since the testimony is all in now except some written statements to come in, I just want to make a statement about the hearing.

The ABA, American Bar Association Committee screens the judges, and they have given Judge Kennedy the highest rating they could give him, "well-qualified." That means that they feel he has integrity, judicial temperament and professional competence.

There is no one who has disputed that testimony during these hearings. None of the witnesses have taken issue with that point. I think the testimony shows here clearly that Judge Kennedy is a profound student of the Constitution and that he will construe the law and the Constitution in the best interests of the public.

I think also that the evidence shown here is that he is an independent thinker and that he answers questions here in an honest and forthright manner, which is very admirable. I think also that the testimony showed that Judge Kennedy is open-minded, that he believes in stare decisis, but that in cases where warranted that he would feel free to take another course; that he would give careful consideration to every case that he hears, and that he also shows compassion.

I think the testimony showed, too, that he does not in any way appear to be prejudiced against anyone on account of his race, his color, his sex or national origin or religion. I think also the evidence is clear that from his practice of law and his service as a pro-

fessor of law and as a judge on the bench that he has gained the respect and admiration of those with whom he has come in contact.

The very fact that we had lawyers here from Sacramento, California, his home city, who testified so clearly in his behalf—Nathaniel S. Colley, Jr., who is a partner in Colley, Lindsay and Colley in Sacramento, a black man, gave strong testimony for him, and also these other witnesses from Sacramento indicate the admiration and esteem in which they hold Judge Kennedy.

I think all of the testimony, in general, shows that he is a man of convictions; he is a man of ability, he is a man of wisdom, and a man of intelligence. I think he possesses all the good qualities that we need in a Supreme Court Justice.

Also, I am convinced too from his testimony and his record throughout his career that he has great respect for the majesty of our system of government, which I think is extremely important. The American Bar did not consider that, but in my opinion that is a criteria that is very valuable and should be considered.

So, for all of these reasons I am thoroughly convinced that Judge Kennedy should be confirmed by this committee and should be confirmed by the Senate, and I predict that that will take place.

Now, Mr. Chairman, in closing, too, I want to take this opportunity to again compliment you during the hearings on Judge Kennedy for your unfailing courtesy, for your usual fairness, and your evident dedication to seeing that these hearings went off in the right way, and that has contributed largely to the smoothness with which these hearings have gone.

We will look forward to the vote in January, and if you wish to fix a date now, we can agree on that.

The CHAIRMAN. I promise the Senator we will vote very shortly after returning. The Senate schedule is not even permanently set at this point, to the best of my knowledge, and I can assure the Senator we will vote before the month is out.

Senator THURMOND. Your word to me is as good as gold that we will vote soon after we return. That is a reasonable commitment. I congratulate you and, again, thank you for all you are doing to make these hearings go so well.

The CHAIRMAN. Thank you.

Do either of my remaining colleagues have anything they would like to say?

Senator HEFLIN. Well, I just look at the Chairman and the ranking member having this love feast right now. [Laughter.]

I would like to comment about the Chairman. I think he has moved expeditiously, but reasonably, and has done a fine job and a very fair job in chairing these hearings.

The CHAIRMAN. Well, I thank you—an unnecessary comment, but appreciated.

Do not feel obliged to say anything, Senator. The hour is getting late, but the Senator from Pennsylvania.

Senator SPECTER. With less than 30 seconds, I have stayed through the concluding proceedings for the purpose of expressing my congratulations to you, Senator Biden, for the conduct of these hearings, for starting them so promptly.

The CHAIRMAN. Thank you.

Senator SPECTER. You were under considerable pressure and counter-pressure. The President announced his intention to submit the name of Judge Kennedy on November 11th and you started these hearings very expeditiously, and I think the conduct of the hearings showed that you were correct; that it was possible to do a thorough job.

I believe that these hearings have been a credit to the Judiciary Committee and a credit to the Senate and a credit to the country. I think that the approach of getting into the record of judicial philosophy and the thoroughness of the committee is exemplary. Here we started shortly after 9:00 a.m. and we are concluding a few minutes before 8:00 p.m., and I think that is a tribute to your operation of the committee, Mr. Chairman.

So I did want to stay to express my appreciation and compliment you on your fine work.

The CHAIRMAN. Well, you are all very gracious. I appreciate that.

I would just say for the record that the Senate schedule does impact significantly on when we can and cannot schedule a hearing. I must tell you, had the nomination come on October 15th instead of November 11th, I probably would not have held the hearings until now anyway.

I believe that we are running at the lower end of the time we need when you are down around 30 days. That is enough time in most cases, but it is tough to get it done in that time. The more appropriate time would be somewhere on the order of 50 to 60 days, in my view.

But with the Senate schedule, the Christmas holiday, and the Senate being out, as was indicated by others of my colleagues, the choice was to go now or not go until the end of January. And to be very blunt about it, we have other important matters, also.

I have a very important responsibility on the Foreign Relations Committee on the INF Agreement, and the rest of us have similar responsibilities. I hope, on reflection, those who opposed us—and none of my colleagues on the committee opposed my starting at this time. I asked for a vote and they all agreed to start at this time, but I hope those who believe we started too early are satisfied by the thoroughness of the questioning and, I might add, the answers from Judge Kennedy.

Well, with that, enough talking. We will stand in recess to the call of the chair.

[Whereupon, at 7:50 p.m., the committee was adjourned.]

WRITTEN QUESTIONS SUBMITTED BY SENATE MEMBERS AND JUDGE KENNEDY'S ANSWERS

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

CHAMBERS OF
ANTHONY M. KENNEDY
UNITED STATES CIRCUIT JUDGE

SUITE 1400
555 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814

January 6, 1988

The Honorable Joseph R. Biden, Jr., Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Biden:

Enclosed please find my answers to the written questions from you and Senators Heflin, DeConcini, Simon, and Levin, forwarded to me by your letter of December 18, 1987. Also, I have made the necessary corrections to the transcript of my testimony before your Committee, and I am transmitting those corrections to the appropriate office.

Please let me take this opportunity to thank you and the members of the Committee once again for the many courtesies you have extended to me.

Sincerely,

Anthony M. Kennedy

Enclosures

ANSWERS TO QUESTIONS FROM SENATOR BIDEN

1. If you assume that every right must have a remedy, difficult questions are raised about what it would mean to eliminate the exclusionary rule. If the courts were to decide that the exclusionary rule is not a proper remedy for violations of an individual's Fourth Amendment rights, the courts would then arguably have to provide some other remedy. Putting aside the issue of whether the exclusionary rule should be abolished, do you believe that there must be some alternative remedy for Fourth Amendment violations before the exclusionary rule could be eliminated?

My testimony before the Committee was that society has paid a high price for putting the exclusionary rule in place. The rule is now an important and workable part of the criminal justice system. It is the duty of the Court to ensure that it is administered in a pragmatic and reasonable manner. Transcript of Hearings, December 15, 1987, Afternoon Session. I also stated before the Committee my belief that when the exclusionary rule was created, the courts were concerned that the Fourth Amendment was not being enforced. Transcript of Hearings, December 15, 1987, Afternoon Session. I am aware that some have argued that alternative means for ensuring compliance with the Fourth Amendment could be substituted in place of the exclusionary rule, but I know of no precise proposal submitted by either Congress or the courts to accomplish this.

2. Even if alternative remedies to the exclusionary rule were in place, it is not clear that the rule should necessarily be abolished. It may be that the rule is desirable for other reasons as well -- to deter police misconduct, for example, or to keep the courts from becoming involved in illegal acts.

In his confirmation hearings to be Director of the Federal Bureau of Investigation, William Sessions testified:

> As a judge, I know that the protections afforded by the exclusionary rule are extremely important to fair play, and the proper carrying out of the law enforcement responsibility. . . . And my own belief is, in the role as director of the FBI, that I would encourage a careful review of [the exclusionary rule], and a careful carving out, if there can be exceptions. But, by and large, I am happy with it and the way it is, because I know that as difficult as it is for law enforcement in the courts, that it

protects the rights of citizens and that is important.

It may be that you disagree, at least in part, with Judge Sessions, as you have referred to the "rigidities" of the exclusionary rule in two of your opinions. If there were an alternative remedy in place, would it be proper, in your view, to abolish the exclusionary rule?

Judge Sessions' comments seem generally in accord with the views on the rule that I expressed in answer to your question 1 above, and, in my Committee hearing testimony, particularly in an exchange with Senator Leahy. Transcript of Hearings, December 15, 1987, Afternoon Session.

The exclusionary rule, and the search and seizure protections it secures, must be interpreted in a reasonable, sensible manner. Fourth Amendment principles are basic liberties, but they should not be synonymous with a doctrine of such abstraction that it cannot be implemented in a practical way.

Before the Court could consider any overruling of the exclusionary rule, it would be required to resolve at least two questions. First, the Court would evaluate whether any alternate protections that were offered to replace the exclusionary rule were in fact effective. Second, the Court would consider whether the exclusionary rule, nevertheless, has independent constitutional significance. Respected jurists and commentators have argued that courts become implicated in the violation of a basic constitutional liberty when they rely on tainted evidence. That argument must be carefully considered in any decision affecting the exclusionary rule.

3. You have occasionally been somewhat critical of the way courts have applied the exclusionary rule. In one case, you stated that it may be necessary to "reexamine it altogether," if it "becomes an end in itself." (U.S. v. Harvey.)

These comments are relevant to a debate that has been carried on in the Supreme Court in recent years. Some Justices, such as Justice Brennan, argue that there are strong moral and legal justifications for the exclusionary rule outside of any impact it may have on police behavior. They argue that it is unconstitutional for the courts to accept evidence that was illegally obtained, simply because the courts must have "clean hands," and must not engage in or benefit from illegal conduct.

Other Justices, such as Justice White, reject the notion that the exclusionary rule has a moral force in and of itself. These Justices argue that the only acceptable rationale for the exclusionry rule is if it deters the police from engaging in improper conduct.

Do you believe that there are any acceptable justifications for the exclusionary rule other than deterring improper police conduct?

If you believe that deterrence is the only acceptable rationale, have you found, based on your experience in criminal law cases, that the rule has been successful in influencing police behavior?

I hope that my answers in questions 1 and 2 are sufficient to respond to this question as well. It bears repeating that the exclusionary rule should not become an end in itself in the sense that it becomes unhinged from the real and substantive Fourth Amendment values that it implements and protects. If presented in the context of a concrete dispute before the Court, I will give every consideration to counsels' arguments on potential purposes and justifications for the rule. The rule has been successful in influencing police behavior.

4. Antonia Hernandez, President and General Counsel of the Mexican-American Legal Defense and Education Fund, testified on Wednesday, December 16, that she had considerable concern about your commitment to protecting the civil rights of the Hispanic community. In particular, Ms. Hernandez said:

> . . . I want . . . to go back and to ask Judge Kennedy to give further assurance and clarification as to how he views Hispanics. My concern is that he might not feel that we deserve the same type of protection as the black community and other protected minorities that are protected from civil rights.
>
> I want that assurance. I want to see what he states on the record. I'm also concerned on the issue of women, the AFSCME issue. I'm concerned on the Spangler issue, I'm concerned with the TOPIC issue, and basically the common threat that one sees in those cases is the threat that he . . . kicks people out of court, that he doesn't give them that opportunity. And even when they do win, even when they do satisfy the stringent requirements of a Federal District Judge, that he overturns those decisions.
>
> He is a man of intellect, no question about it; a man of devotion, but he's also a man of the establishment and, unfortunately, we have not been part of that establishment.

> **And what I want is an expans[ive] consideration of that perception of what America is. (Tr. 12/16/87, at 258-59.)**

Please identify those aspects of your record that, in your view, respond to Ms. Hernandez's concerns. In addition, please discuss whether and how the philosophy and approach that you would bring to the Supreme Court, should you be confirmed by the Senate, would be responsive to these concerns.

As a Californian, I have understood for many years that Hispanic people are a vital part of our society and culture, and that their ethnic or minority status should not be used to disadvantage them, either by acts of hostility or acts of passive indifference.

Indifference to the civil rights of Hispanics, women, and other minorities is unacceptable. Hispanic persons are entitled to civil rights protections, in whatever degree is necessary to ensure that they have each and every one of the rights guaranteed to all Americans. In my testimony before the Committee, I stated that "We simply do not have any real freedom if we have discrimination based on race, sex, religion or national origin, and I share that commitment." Transcript of Hearings, December 14, 1987, Afternoon Session. I also stated in my testimony that the Equal Protection Clause applies to all persons: "[t]he amendment by its terms, of course, includes persons, and I think was very deliberately drafted in that respect." Transcript of Hearings, December 14, 1987, Afternoon Session. I stated in my response to the Senate Judiciary Committee Questionnaire that "[c]ompassion, warmth, sensitivity, and an unyielding insistence on justice are the attributes of every good judge." Questionnaire at 54.

I have written or joined various opinions ruling in favor of claims brought by Hispanics, women, and other civil rights claimants. In Flores v. Pierce, 617 F.2d 1386 (9th Cir.), cert. denied, 444 U.S. 875 (1980), I upheld a judgment in favor of Hispanics against municipal officials who had a history of racially motivated activity against Hispanics. In James v. Ball, 613 F.2d 180 (9th Cir. 1980), rev'd, 451 U.S. 355 (1981), a voting rights case, I invoked the one-person, one-vote principle to strike as unconstitutional a state statute that limited voting in elections for directors of an agriculture and power district to landowners, even though a large number of the district's users of water and power were not landowners. In Bates v. Pacific Maritime Ass'n, 744 F.2d 705 (9th Cir. 1984), I upheld an employer's obligations under a Title VII consent decree that required four of each ten new employees be minority group members, by finding that the consent decree applied to the successor employer that had acquired the business. In NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979) (Kennedy, J., concurring), I concluded that illegal aliens are employees entitled to protection under the

National Labor Relations Act, and stated that "if the [Act] were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case." Id. at 1184. In Lynn v. Western Gillette, Inc., 564 F.2d 1282 (9th Cir. 1977), I wrote an opinion that adopted a broad and generous interpretation of the time period for claimants to bring suit in sex discrimination cases.

The Flores case extensively reviewed evidence of discrimination, including subtle code words for discrimination, such as statements that applications were reviewed for "desirability" of the applicant, that the town involved was "a fine little town," and that it was necessary to keep the town on a "good level." In summarizing the holding of the case, I stated:

> One of the first cases interpreting the equal protection clause stands for the rule, among others, that the effect of a law may be so harsh or adverse in its weight against a particular race that an intent to discriminate is not only a permissible inference but also a necessary one. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). In the instant case, the disparate effect of the action on Mexican-Americans was so compelling that the effect may approach, if it does not reach, the demonstration of an intent to discriminate that was made in Yick Wo v. Hopkins. This might be a case where "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action." Arlington Heights, supra, 429 U.S. at 266, 97 S. Ct. at 564. We need not, however, rely on effect alone, for other evidence suggests a motive or intent to discriminate. It was shown that the defendant city officials deviated from previous procedural patterns, that they adopted an ad hoc method of decision making without reference to fixed standards, that their decision was based in part on reports that referred to explicit racial characteristics, and that they used stereotypic references to individuals from which the trier of fact could infer an intent to disguise a racial animus.

617 F.2d at 1389.

In addition, from 1967 through 1969, I represented a group of Hispanic citizens of the Sacramento area. The group planned to develop a city block in downtown Sacramento as a cultural center and retail complex with emphasis on fostering Hispanic culture and providing opportunities for businesses owned

by Hispanic proprietors. We were successful in obtaining from the Redevelopment Agency of the City of Sacramento development rights for one square block in the downtown area. We incorporated an entity called Plaza de las Flores. After submission of a prospectus, we received a permit from the Commissioner of Corporations of the State of California for a limited public offering to raise the necessary capital. Building costs, interest rates, and other economic factors became unfavorable, and the cultural center was not developed. I devoted over five hundred hours of unpaid legal services to this project, and in the course of it came to know better and understand the aspirations of the Hispanic community in California.

ANSWERS TO QUESTIONS FROM SENATOR DeCONCINI

1. You were quite critical several years ago on the portion of the Judicial Tenure Act dealing with the discipline of judges.

Now that this provision has been in effect for a few years, I would like to know if your feelings about it have changed at all, and whether you feel the independence of the judiciary has diminished?

I am pleased to have the opportunity to comment on my criticism of the original legislative proposal that led to enactment of the Judicial Tenure and Disability Act.

At the 1978 Ninth Circuit Conference, there was considerable concern about the bill in its original form. At the request of the judicial delegation of the Conference, I presented the opposition case in response to a presentation by Leonard Janofsky, then President of the American Bar Association, who spoke in favor of the bill.

In its original form, the bill would have established a national commission, ignoring existing lines of authority within the circuits. The commission would have had authority to remove a judge from office without the necessity of impeachment. My position was that the core of judicial independence would be subverted by either or both of these provisions. I adhere to that view.

As other judges voiced similar opposition and were prepared to testify against the bill, I took no part in any later discussions or hearings on the bill. The two principal features that I had criticized were eliminated from the enacted measure.

The Act in its present form was adopted in 1980. I have not had extensive contact with it. I did suggest that the Ninth Circuit should draft rules to implement the Act, and I participated in that project. Our rules were sent to other circuits for study and were considered by the Judicial Conference of the United States in its recommendations for uniform rules. I have received reports from time to time from our Chief Judge and from the Assistant Circuit Executive charged with administering the Act. We have had two serious cases, one involving a non-Article III judge and one involving an Article III judge. In both of these matters, I was either off the Circuit Council on rotation or recused.

Over the last decade, I have observed that federal judges are becoming more conscious of their responsibility to explain and clarify judicial procedures to the public and are becoming more conscious, too, that the perception of fairness, as

well as the fact of it, is essential in any judicial system. This growing sensitivity reflects several factors, including heightened awareness of the duty of all officials to be accountable to the public; effective use of the Circuit Conference to exchange views between the bench and the bar regarding attitude, temperament, and performance of judges; and the institution, through the Circuit Conference, of procedures for individual judges to take surveys and use other techniques for self-evaluation. These matters are difficult to measure, but I tend to think this change in attitude would have come about without passage of the Act. Nevertheless, the provisions of the Act fit well within this framework.

My own assessment is that in the Ninth Circuit the experience under the Act has been good. The Act provides an avenue for lawyers or litigants to express criticism or grievances. This has value in itself, both as a safety valve and as a basis for us to evaluate our performance. In this circuit, a copy of any complaint goes immediately to the judge concerned. Many of the complaints are frivolous, but, even so, the existence of a misunderstanding or dissatisfaction is significant for the judge involved.

2. Do you believe that there are any specific areas of the Act which require refinement? This is, of course, assuming that the Act will remain in force. If your answer is yes, what suggestions would you have for improving this Act?

I have not studied the Act at great length and have no specific suggestions for amendment or refinement. Question 2 is broad, so please note my failure to suggest amendments should not be understood as saying the Act is valid in its various potential applications.

3. Judge Kennedy, if your opinion of the Judicial Tenure Act has not changed in the last seven years, what alternatives would you offer in replacement of the Act?

Pending further study, I would not recommend repeal of the Act as it exists or an alternative to replace it.

4. In your opinion, do you believe the implementation of the Act has had any positive effect on the judiciary? Has there been any negative effect on the judiciary since adoption of the Act?

I drafted my answers to questions 1 and 2 to be responsive to this question as well. I have noted the positive effects, though it is difficult to measure how many are directly attributable to the Act. I see no negative effects, except that the Act should not be a precedent for interference with judicial independence in the guise of imposing further disciplinary procedures.

5. Judge Kennedy, I am curious as to how you feel this legislation would undermine the independence of the judiciary when it does not take any authority away from the judiciary. The legislation merely provides a process through which the judiciary may police itself.

You have stated that this legislation will pit judge against judge. Even if this occurs, how would this amount to an undermining of judicial independence?

Since the Act would promote the integrity and moral behavior of judges, wouldn't the independence of the judiciary viz-a-viz the legislative and executive branches actually be strengthened?

As indicated, my opposition to the legislation was in its original form, and not as it is now on the books.

I respectfully submit my 1978 comment that we must be careful not to pit judge against judge remains valid. A federal judge is independent not only from other branches of the government, but also from other judges within the judiciary, subject to review and correction of his or her judgments in the ordinary course and to routine administrative control. Legislation that puts disciplinary power in the hands of judges can be just as corrosive of judicial independence as legislation that puts disciplinary powers in the political branches. A decision in favor of an unpopular cause can make the judge unpopular with his or her colleagues, as well as with the public. That judge deserves protection. Judicial independence has an individual aspect, as well as an institutional one.

Finally, the suggestion that a statute enhances independence because it promotes integrity and moral behavior is unavailing, especially if offered as a blanket justification for proposals of the incursive kind I criticized in 1978. In that context, the argument proves too much. Separation of powers is an essential element of the constitutional design. The lesson of history is that structural integrity of the separate branches preserves the constitutional balance. A breach of the structure undermines that balance, whatever the motive. Judicial independence may be lost beyond restoration if it is compromised, even for the best of motives. It is my hope that Congress will continue to review the Act we are discussing in this series of

questions, and that it will give all deference to the proposition that structural independence of the judiciary is one of the surest protections of our constitutional freedoms.

6. Judge Kennedy, let us assume that your criticisms of the Judicial Tenure Act are right on target.

Do you feel that the impeachment process, the primary constitutional policing mechanism on the judiciary, can sufficiently redress all instances of judicial misconduct, given the time and other practical restraints which are inherent in the impeachment process?

If you respond in the negative, then how do you propose that we fill this void?

Recent events reaffirm that sufficiently serious misconduct by a federal judge may result in the judge's impeachment. Although impeachment is a somewhat cumbersome process, it retains its vitality.

In my view, judicial independence is best preserved if the impeachment process is the sole mechanism to remove federal judges. The Framers insisted on judicial independence as a necessary component of the elaborate and delicately-balanced constitutional system they devised, and impeachment was the device that the Framers provided to hold judges accountable for their misconduct. I urge this as a matter of policy and do not thereby intend to express an opinion on constitutional interpretation.

ANSWERS TO QUESTIONS FROM SENATOR HEFLIN

1. Judge Kennedy, would you please elaborate on your views of the incorporation doctrine? Do you believe that the authors of the due process clause intended to apply the Bill of Rights against the states, as well as the Federal government? Do you accept the Supreme Court's rulings in this area as settled law?

In 1925, in Gitlow v. New York, 268 U.S. 652 (1925), the Supreme Court announced that it would assume that the First Amendment right of free speech was encompassed within the word "liberty" of the due process clause of the Fourteenth Amendment. The Supreme Court has since held that many of the provisions of the Bill of Rights apply to the states by incorporation through the Fourteenth Amendment. In so doing, the Court has been careful to reject the argument, made most notably by the late Justice Black, that the Bill of Rights is applicable in its entirety to the states. I have not formed any conclusive views on this point; and the question whether certain provisions should be applied to the states (the civil jury trial guarantee of the Seventh Amendment, for example) may still come before the Court. Accordingly, while the incorporation doctrine is a central tenet of constitutional law, its application in discrete instances is still open to explanation and refinement.

2. Judge Kennedy, as you know, Section 2 of Article III refers to the appellate jurisdiction of the United States Supreme Court, and has the exceptions and regulations clause contained therein. Would you set forth your views on whether Congress could strip the Supreme Court or the lower federal courts of jurisdiction pertaining to a particular subject matter such as school prayer?

The scope of congressional power under the exceptions and regulations clause has been a subject of debate since the inception of the federal judicial system under the Constitution. While the power conferred in Congress is undoubtedly significant, its limits must await a case by case determination.

As a general matter, it appears to me that there are serious questions whether Congress is authorized to constrain the jurisdiction of the Supreme Court to determine issues of federal law or constitutional rights. Under the tripartite scheme of government established by the Constitution, the Supreme Court is generally regarded as the ultimate arbiter of the meaning of federal law and rights conferred on individuals by the Constitution. There would be grave constitutional questions concerning whether the exceptions and regulations clause gives

Congress the power to divest the Supreme Court of jurisdiction to hear cases involving school prayer if the effect were to strip the Court of jurisdiction to determine rights under the First Amendment.

This is a distinct question from the power of Congress to alter the diversity jurisdiction of the federal courts. I have suggested that in order to reduce the heavy caseload of the federal courts, Congress may wish to consider excluding certain classes of diversity cases, such as auto accident cases.

Please refer also to my answers to Senator Simon's written questions on this point.

ANSWERS TO QUESTIONS FROM SENATOR SIMON

1. I would like your views on one of my favorite quotations from Justice Harlan. He said, "Liberty is not a series of isolated points pricked out in terms of the taking of property, the freedom of speech, press, and religion. It is a rational continuum which, broadly speaking, includes a freedom from all substantial, arbitrary impositions and purposeless restraints." What do you believe should be the Supreme Court's role in advancing that continuum?

As I stated in a response to a question of Senator Biden on December 14, 1987, there is a zone of liberty, a zone of protection for the individual. A line is drawn, and the individual can tell the government that beyond the line it may not go. The Supreme Court's role is to determine where that line is drawn and to determine what principles are to be used in defining the protections contained within the zone of liberty. Transcript of Hearings, December 14, 1987, Afternoon Session. Those principles must be based on an objective application of the Constitution.

Incidentally, I too admire Justice Harlan, whose words you quote.

2. Judge Kennedy, I had an exchange with Judge Bork during the hearings on his nomination that helped crystallize for me the differences in our philosophy. I don't assume you necessarily share Judge Bork's views, but I would like your comments on our discussion.

In a speech Bork had stated, "what a court adds to one person's constitutional rights, it subtracts from the rights of others." I asked Judge Bork about that statement, and he told me, "I think it's a matter of plain arithmetic." Now, as I told Judge Bork, "I have long thought it to be fundamental in our society that when you expand the liberty of any of us, you expand the liberty of all of us." Please comment.

As a philosophic and legal proposition, I agree with your statement that ". . . in our society . . . when you expand the liberty of any of us, you expand the liberty of all of us." Our constitutional history is replete with examples of cases in which the Supreme Court has held that the liberty provided in the Constitution extends to a particular action or right asserted by a person; and, as a result, all of our freedoms have been enhanced.

I think there is universal agreement that liberties are not absolutes which must necessarily supersede all competing interests. In an appropriate case where the rights of others are implicated, the authority of the legislature to regulate begins to come in play. For example, the constitutional right to travel does not necessarily include the right to trespass on the property of another, and the right of free speech does not permit a person in every instance to defame another.

3. My father was a Lutheran minister, and I understand the yearnings that some people have for values. But while I believe that there are some things government can do well, there are also things government cannot do well, like promote religion. I think it is important to respect our constitutional tradition of separation of church and state. The system that has evolved is basically very healthy for both government and religion.

In 1968 in a publication of the students of the McGeorge Law School, you were asked how you would like the law reformed in your field, constitutional law. Among other things you stated:

> "And the Court should leave room for some expressions of religion in state-operated places. There should be a place for some religious experience in schools, for a Christmas tree in a public housing center."

Is this still your view? Could you elaborate? What principles would you use in deciding what religious expressions should be permitted state sponsorship?

As I told Senator Heflin in response to a similar question about that article, the law would be an impoverished subject if my views had not changed over twenty years. Transcript of Hearings, December 14, 1987, Afternoon Session. As a circuit judge, I have not had an opportunity to address Establishment Clause questions in depth. I have no fixed views on the subject, and I would not now necessarily endorse all of the views in the article you quote.

As I understand the Establishment Clause, which, among other protections, prohibits the government from either advancing or inhibiting religion, it can work at counter purposes with the Free Exercise Clause. The classic example is government's determination whether to furnish a chaplain to soldiers stationed on a military base. If the government does supply a chaplain, it is in a sense advancing religion; if it does not, one could argue that it is inhibiting the free exercise of religion. Transcript of Hearings, December 14, 1987, Afternoon Session.

This is a complicated area of the law, and the decisions are difficult to reconcile. The Supreme Court has relied on the historic practices of the people of the United States for guidance in interpreting the Establishment Clause, and this approach is helpful, although not necessarily conclusive. I recognize that the Establishment and Free Exercise Clauses are fundamental precepts of American constitutional law. Transcript of Hearings, December 14, 1987, Afternoon Session. The framers of the Bill of Rights, as well as the framers of the main body of the Constitution, recognized these principles in explicit terms. U.S. Const. art. VI, cl. 3; U.S. Const. amend. I. I will endeavor to decide how these constitutional provisions should be implemented by an objective application of the text and purpose of the Framers in light of the Supreme Court's precedents.

4. In answer to a question from Senator Thurmond yesterday, you suggested that one way to reduce the workload of the federal courts would be for Congress to exclude certain kinds of cases from federal court jurisdiction. Legislation to remove various kinds of cases -- school prayer, abortion, busing to remedy segregated schools --- from the Supreme Court and other federal jurisdiction has been introduced and is pending in the Subcommittee on the Constitution, which I chair. These bills have proven to be highly controversial. In what kind of cases do you think Congress should consider eliminating federal jurisdiction? What Constitutional problems might that pose?

In view of your interpretation, it is most important to clarify my response.

I did not intend to suggest that it is constitutional for Congress to limit jurisdiction in a class of cases based on the constitutional or federal issues presented. In fact, I suggested at one point in my testimony that Congress should not take that step without serious consideration of the grave constitutional questions it would present. Transcript of Hearings, December 14, 1987, Afternoon Session.

My answer to Senator Thurmond was in the context of diversity cases. For some years, those who study the federal system have been concerned that the heavy workload of the courts may have an adverse affect on the continued efficiency of the federal courts in the interpretation and enforcement of federal law. One solution offered over the years is to eliminate or curtail diversity jurisdiction. I suggested in my testimony that rather than increasing the jurisdictional amount in diversity cases, a proposal that has its own set of problems, Congress could consider changing diversity jurisdiction to exclude certain classes of diversity cases, e.g. auto accident cases. Transcript of Hearings, December 14, 1987, Afternoon Session. I do not necessarily endorse this without further study; the comment was to suggest an approach for further consideration by Congress.

Please refer also to my answers to Senator Heflin's written questions on this point.

5. Last August, in a panel discussion at the Ninth Circuit Judicial Conference in Hawaii you addressed what you called the "unwritten constitution," which you defined as "our ethical culture, our shared beliefs, our common vision, and in this country, the unwritten constitution counsels the morality of restraint."

There have been times, however, when the shared beliefs or common vision of the majority have resulted in the deprivation of rights of minorities, such as the belief that whites and blacks should not have access to the same restaurants or seats in a bus or public schools, or that Japanese-Americans should be removed to internment camps.

When do you believe it is appropriate for courts to intervene in opposition to widely shared beliefs?

Some of the most significant cases in the history of the Court are those in which the Court protected minorities from laws enacted by a majority insensitive to their rights and liberties. Indeed, those are the instances in which rights and liberties are most endangered. This is the very protection that the judiciary exists to provide. The highest duty of a judge is to use the full extent of his or her power where a minority group or even a single person is being denied the rights and protections of the Constitution.

The unwritten Constitution I refer to consists of additional commitments to liberty and freedom, not ideas or sentiments which undercut it. There are about 160 written Constitutions throughout the world; but in few of those societies do any real protections for life or liberty exist. Americans, on the other hand, have a commitment to the rule of law and to the idea that we are all bound to respect the rights of others. This underpinning of our Constitution is a great heritage that ensures our written Constitution is a living reality, not, in Madison's phrase, a mere "parchment barrier."

6. During that same panel discussion, you stated that "a principled theory of constitutional interpretation necessarily requires that there must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers." You have previously acknowledged that there are some "spacious" terms in the Constitution, phrases like "liberty," "equal protection," and "due process."

How does the doctrine of original intent relate to these spacious phrases?

In an extended series of exchanges with Senator Specter, I maintained that specific intent of the framers, that is to say their actual thought process, is not an adequate basis for interpreting the Constitution. Transcript of Hearings, December 15, 1987, Morning and Afternoon Sessions.

The framers chose their words with great care. Those words have an objective meaning that we should ascertain from the perspective of history and our constitutional experience. The words of the Constitution, their objective meaning, and the official consequence of their enactment as a constitutional rule, are the principal guides to constitutional interpretation. This said, please permit me to underscore my earlier statements that I do not have a unitary or grand design of constitutional interpretation.

7. Judge Kennedy, I have reviewed a number of your decisions on voting rights matters. When I was an Illinois state legislator in the 1960's I observed the dramatic changes in many of our state legislatures brought on by the U.S. Supreme Court's decisions applying the "one person, one vote" doctrine. I was pleased to note, therefore, that one of your opinions extended that principle to a state agriculture district and reversed a district court which permitted a voting plan limited to landowners. (James v. Ball, 613 F.2d 180). However, your decision in Aranda v. Van Sickle, 600 F.2d 1267 (1979), troubles me. There, you concurred in a decision which threw out a class action lawsuit alleging voting discrimination against Mexican-Americans in San Fernando, California. You examined the record of only three Hispanics elected to the City Council in sixty-five years, almost no Hispanics appointed to municipal posts, low voter registration levels, and, for those Hispanics who did go to the polls or observed the proceedings there, evidence of harassment and discriminatory placement of voting machines in white homes. You affirmed the district court's opinion ascribing the lack of Hispanic participation in politics and municipal jobs to apathy, low education and high unemployment, not discrimination. I am disappointed by this. Can you share with me your reasons for not letting these plaintiffs go to trial? Also, on the issue of standing generally, in what cases have you ruled in favor of civil rights plaintiffs?

I discussed at length my concurring decision in the case of Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980), in response to questions by Senators Kennedy, Metzenbaum, and Specter. Transcript of Hearings, December 15, 1987, Morning and Afternoon Sessions. I respectfully refer you to those remarks as a detailed answer to your first

question. In essence, my separate opinion in that case indicates that the relief sought exceeded the actual injury alleged. As I understood the law and precedents then existing, the framework of the suit established by the plaintiffs justified the grant of summary judgment against the plaintiffs on the pleadings before us. Legislative enactments since that decision might change the result.

For me the case was, and remains, a close and troubling one. The point of the concurrence was to disassociate myself from the reasoning of the district court and my colleagues. My concern with the language and reasoning of both the district court and the majority opinion in the court of appeals prompted me to write the separate concurrence to underscore that there was evidence of discrimination that these other judges overlooked. I said:

> To conclude that the plaintiffs' evidence could not justify striking down the at-large election system does not, in my view, necessarily mean that plaintiffs may not be entitled to some relief. For example, plaintiffs' statistics regarding placement of polling places in private homes, few of which are Spanish-surnamed or located in the barrio, might be sufficient to withstand a summary judgment motion in a lawsuit seeking to have some of the city's polling places located in the Mexican-American community. Similarly, although a minority group does not have a constitutional right to proportional appointments on municipal commissions, the plaintiffs' showing in this case regarding Mexican-American representation of city commissions might, after further examination, justify a remedial requirement of increased consideration and/or appointment of Mexican-Americans to such bodies.

600 F.2d 1279. The concurrence argues that the injuries alleged by the plaintiffs would be sufficient for a trial on the merits if appropriate relief had been sought.

You further ask, "on the issue of standing generally, in what cases have [I] ruled in favor of civil rights plaintiffs." While not a traditional civil rights case, in Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), aff'd, 462 U.S. 919 (1981), I wrote a majority opinion holding that an alien facing deportation proceedings had standing to challenge the underlying statutory scheme. Also, in Graham v. Deukmejian, 713 F.2d 518 (9th Cir. 1983), I joined in a majority opinion recognizing standing for Jehovah's Witnesses who challenged actions by the State of California. It was alleged that the state was interfering with physicians who acceded to the plaintiffs' religious preferences in performing certain medical operations.

8. In Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), Justice Powell in a case from a different circuit cited nine federal circuit decisions which differed from your decision in TOPIC v. Circle Realty, 532 F.2d 1273 (1976). Justice Powell pointed out that "[m]ost federal courts that have considered the issue agree that section 810 and 812 provide parallel remedies to precisely the same prospective plaintiffs. . . the notable exception is the Ninth Circuit TOPIC v. Circle Realty." (citation omitted): Gladstone at 108. Justice Powell concluded, "[T]he Court of Appeals in this case correctly declined to follow TOPIC. Standing under section 812, like that under section 810, is 'as broad as is permitted by Article III of the Constitution.'" Id. at 109.

I know that Senator Kennedy discussed this case with you yesterday and I do not wish to belabor it. However, I was left a little dissatisfied with your answer. I want a Supreme Court Justice who leads on civil rights and does not arrive at the correct position years later. At this point, I am confident that you are a forward-looking individual. However, in this case you chose to interpret the Fair Housing Act narrowly. Don't you believe that it is important that civil rights statutes be read to encompass rights rather than dispense with them without a hearing on the merits of a claim?

It remains a fundamental precept of the judicial process that jurisdictional and procedural requirements must be satisfied before courts are empowered to adjudicate disputes, and this principle is, of course, applicable to civil rights cases.

In TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir.), cert. denied, 429 U.S. 859 (1976), the first question addressed was whether, as a matter of law, the plaintiffs could assert a violation of a statutory right. The Act contained two different sections with jurisdictional grants. The case turned on a jurisdictional section that had not yet been interpreted. The opinion I wrote for a unanimous panel held that the claims under this section could not be addressed in court without first being submitted to the agency that Congress had created for enforcement of the Act. As shown by our experience with voting rights, agency action is sometimes more effective than court action as a remedy for system-wide deprivations of rights. The TOPIC opinion interpreted the statutory provision as requiring plaintiffs to apply first to the administrative agency for relief. The opinion did not, therefore, hold that the plaintiffs could not secure judicial relief at any point.

Three years later the Supreme Court interpreted the statute differently. Incidentally, Justice Powell found there were district court decisions on point, not circuit court opinions. As I told the Committee, I respect the Court's decision

without reservation. Transcript of Hearings, December 15, 1987, Afternoon Session.

I am in full agreement that civil rights statutes should be read in a fair and common sense way to encompass each and every one of the concerns to which they are addressed. I agree with the premise implicit in your question that the civil rights statutes should not be interpreted in a grudging, timorous, or unrealistic way to defeat congressional intent or to delay remedies necessary to afford full protection of the law to persons deprived of their rights.

9. One of the most critical factors in my evaluation of a Supreme Court nominee is that individual's sensitivity to women's rights. Over my lifetime I have seen much needed progress made in this area. Much of the progress is due to the willingness of the Supreme Court Justices to move this country in the right direction. For example, in 1971 the Court in the landmark decision of Reed v. Reed held that because women have been the subject of unreasonable prejudices, laws affecting such groups must be given very careful scrutiny. Courts in evaluating laws which treat women differently than men must determine not if there is a rational basis for this difference, but rather if the difference is substantially related to an important government interest. I question whether Judge Bork was sensitive enough to the need for heightened scrutiny in this area. In reviewing your record I am pleased to see that you have correctly described the test that should be applied in sex discrimination cases. However, I am a concerned about your application of the test. Therefore, I would like to know what is your view of the appropriate test for deciding sex discrimination cases under the 14th Amendment, and can you cite any example of cases in which you have applied it appropriately?

The law in this area is in a state of evolution and flux, but the Court's general trend is a plausible and a rational way to implement the Equal Protection Clause. It will require more cases to ascertain whether or not the heightened scrutiny standard is sufficient to protect the rights of women. I have not specifically addressed this question in any case that has come before me as a circuit judge.

10. If we are to eliminate sex discrimination we must get away from commonly held beliefs about the "proper" role of women in society. Only when we evaluate people as individuals, rather than as members of groups, will women achieve equality. I have noticed in your decisions an apparent willingness to look to custom and tradition in deciding sex discrimination cases. For example, in 1982 in Gerdom v. Continental Airlines you disagreed with the majority's decision that weight requirement for female flight attendants was discriminatory on its face. Instead you

supported the argument that customer preferences for attractive women was reasonable. It concerns me that you would consider these customer preferences, which smack of prejudice, to be an appropriate criteria. Could you comment upon the role you feel custom and tradition should play in reviewing sex discrimination cases?

In Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982), cert. dismissed, 460 U.S. 1074 (1983), I joined in a dissent from an en banc decision finding the airline liable for discrimination on the basis of sex because the airline's policy required flight hostesses to comply with strict weight requirements as a condition of employment. The majority found that the plaintiffs had made out a cause of action under the disparate treatment theory. The dissenters maintained that liability under the disparate treatment theory should not be imposed automatically. The dissent noted the failure of the district court to develop a record regarding the airline's contention that the regulation affected different classes of women and that women were not being treated differently from men. The dissent wanted the facts established to better answer the very concerns which underlie your questions. The dissenters did not suggest, and I would not have subscribed to a suggestion, that custom and tradition could form the basis for legitimate employment criteria if those criteria were used as a pretext to discriminate on the basis of sex.

11. In one of your decisions, you write that "indifference to personal liberty is but the precursor of the state's hostility to it" (U.S. v. Penn, 647 F.2d at 899). I agree with that statement. It was made in a case where the personal liberty at stake was the traditional parent-child relationship and you felt strongly that it should be protected. Serious concerns have been raised, however, about your decisions concerning liberty and equality in other areas -- particularly in cases where women seek to protect their rights to pursue jobs and equal pay beyond the traditional parent-child relationship. Do you believe that indifference to personal liberty is but the precursor of the state's hostility to it when it comes to equal rights for women? How do your decisions and opinions show that?

I agree that indifference to the rights of women to obtain employment and to receive equal pay for equal work is unacceptable, and, more generally, that active hostility can follow indifference in cases involving women's rights, just as with other liberties.

In my testimony before the Senate Judiciary Committee on December 14, 1987, I stated that "We simply do not have any real freedom if we have discrimination based on race, sex, religion, or national origin, and I share that commitment." Transcript of

Hearings, December 14, 1987, Afternoon Session. I also stated in my testimony that the Equal Protection Clause applies to all persons: "the amendment by its terms, of course, includes persons, and I think was very deliberately drafted in that respect." Transcript of Hearings, December 14, 1987, Afternoon Session. I stated in my responses to the Senate Judiciary Committee questionnaire that "[c]ompassion, warmth, sensitivity, and an unyielding insistence on justice are the attributes of every good judge." Questionnaire at 54.

While I have been involved in only a limited number of cases concerning the rights of women, I have written or joined various opinions ruling in favor of claims brought by women. For instance, in Lynn v. Western Gillette, Inc., 564 F.2d 1282 (9th Cir. 1977), I wrote an opinion that adopted a broad and generous interpretation of the time period for claimants to bring suit in sex discrimination cases. Also, in Morrill v. United States, 821 F.2d 1426 (9th Cir. 1987) (per curiam), I joined an opinion permitting a rape victim to bring an action for damages against the federal government under the Federal Tort Claims Act for its negligent supervision of the rapist, a military enlisted man.

12. I believe a Supreme Court Justice must demonstrate a sensitivity to individual rights and liberties. Indeed what distinguishes this country from others is our commitment to individual freedom. The individual rights recognized by the Supreme Court are extremely important to the progress of our nation. In choosing a new Supreme Court Justice I am looking for someone who would not jeopardize the precision gains that have been made, and who would further the development of these Constitutional rights. Thus, I was pleased to see that in two of your Fourth Amendment opinions upholding the exclusion of evidence, U.S. v. Penn, 647 F.2d 876 and U.S. v. Cameron, 538 F.2d 254 you have relied heavily, and with considerable conviction on the importance of the privacy interests invaded -- focusing in Penn on the sanctity of the parent-child relationship and in Cameron on the intrusiveness of that rectal search.

What relationship, if any is there between your protectiveness of these rights in the context of the Fourth Amendment and your views regarding a generalized right of privacy in non-criminal areas?

As your question indicates, the Fourth Amendment protects certain privacy interests of individuals. And, as I have indicated in my testimony to the Committee, I believe that the liberty protected by the Fifth and Fourteenth Amendments includes protection for the value that we call privacy. Transcript of Hearings, December 15, 1987, Morning Session. Both the holdings and the reasoning of the Fourth Amendment cases you cite can be instructive in determining the rights of individuals in the civil context. The Supreme Court's jurisprudence on the right to

privacy may be still in the early stage of evolution, and I have no fixed view or overriding theory about the full scope of the right to privacy. Transcript of Hearings, December 15, 1987, Morning Session. I can assure you that I will interpret and apply the Constitution in accordance with the general judicial approach that I have described to the Committee, regardless of whether a given constitutional claim arises under the Fourth, Fifth, or Fourteenth Amendments.

13. I am a member of the Subcommittee on Immigration and Refugee Affairs and I have found that policy area to be among the most challenging ones in the Senate. I have examined your decisions and speeches concerning immigration. If you are confirmed by the Senate, you will bring to the Supreme Court more experience in this area than the other Justices did. In the Apollo Tire case you enforced an NLRB decision granting labor law protections to undocumented immigrant workers and wrote that doing otherwise "would leave helpless the very persons who most need protection from exploitative employer practices." NLRB v. Apollo Co., Inc., 604 F.2d 1187 (1979). The Supreme Court accepted this expansive protection five years later in Sure-Tan v. NLRB, 467 U.S. 883 (1984). However, in a 1984 Rotary Club speech you seemed to question the expansion of asylum claims when you said, "Asylum formerly was thought of as the right of a sovereign state to protect the alien, but now is viewed as a personal right of the alien to protect his or her own life and property." Finally, before the Barristers Club of Sacramento in 1985 you stated, "If we do not announce supportable, workable, and doctrinally consistent principles in the area of immigration law, our court could be the subject for harsh and legitimate criticism."

Please explain for me what doctrinal principles you would favor and of what type and from what sectors criticism would result if your approach were not adopted.

As I have testified, I have not developed a comprehensive theory of law or a system of principles to be applied to every case that I have to decide. Transcript of Hearings, December 15, 1987, Morning Session. Likewise, I have no set doctrine to be applied to immigration cases.

Immigration cases are difficult. The individual alien before the court has often done nothing more than what all of our ancestors did: travelled to this land in search of a better life. As with any case, a judge must examine with care the facts of the case, the text and history of the applicable laws, and any applicable precedent.

The myriad factual permutations of immigration cases make it difficult to formulate consistent doctrinal rules. Consistent rules are required, however, if the courts are to apply the law in a fair and evenhanded way. They are also necessary if

we are to give adequate guidance to the district courts and agencies. In my remarks to the Barristers Club in 1985, I was stressing the necessity for the many panels of the Ninth Circuit to develop cohesive doctrinal rules for immigration matters. If courts appear to be using unprincipled and inconsistent rules in any area of law, they will be subject to legitimate criticism from the various sectors of our society which are interested in their decisions.

The 1984 Rotary Club speech passage you cite was not intended to suggest that asylum claims should not be recognized or protected in a generous way. I used the example of the developing law of asylum as merely one facet of the emerging impact that human rights principles are having on immigration law.

The traditional approach to asylum has been shifted by recent Congressional enactments. It is apparent that a new dimension to the right of asylum has been added, one personal to the persecuted individual. The example was used to show that the law has changed to recognize political and social persecution to which we once were somewhat oblivious and to extend protection to persons who suffer from such persecution. The passage was offered in an historical context, not a critical one.

14. Judge Kennedy, I note in your written response to the Committee questionnaire that as a judge you have made 35 appointments of clerks to serve in your court. Of those, five were women and one was a minority, an Asian American. I know that the law schools in California where you sit probably have the highest percentage of minority law students in the country. I am not a lawyer but my wife and daughter are so I know that appellate court clerkships are usually a prerequisite for Supreme Court clerkships and often lead new law students to the track of academic positions and eventually judgeships of their own. I would like for you to discuss your hiring procedures, where you look for clerkships candidates, and any particular reason why you have never had a Hispanic or a Black law school graduate as one of your clerks?

At the outset, to the extent the question expresses a view that women and members of minority races should be represented in full strength in all spheres of the legal profession, I endorse the view without reservation. I am pleased that my female clerks, no less than my male clerks, have gone on to distinguish themselves as lawyers in government service, academia, and private practice. In one recent year, two of my three law clerks were women. As stated in my answers to questions at these hearings, arbitrary barriers that prevent women and racial minorities from achieving their full potential, in the legal profession or in any other occupation, have no place in today's society. Transcript of Hearings, December 15, 1987, Afternoon Session.

I do not look for clerks, or encourage applications, from any particular area of the country, or from any particular law school. Two of my clerks have been nationals of a foreign country. Every year, we receive somewhere between 100 and 200 applications for clerkships, from all over the country, and from a great number of law schools. My law clerks go through the applications initially to identify the candidates with superior academic records and recommendations. We offer interviews either by me or by a former clerk who lives in the applicant's area of the country, or both. We impose no ideological test and no barriers based on race, religion, sex, or ethnic background.

It is important to encourage more minority persons to attend law school, to enter the legal profession, and to begin their career as clerks. I welcome the opportunity to hire black and Hispanic clerks, as well as women, and will continue my attempts to do so while I remain a member of the federal judiciary.

15. Throughout my years of public service, America has become increasingly aware and concerned about the problems facing seniors. Issues like health care and mandatory retirement will become even more important during your years on the bench. I was certainly pleased to see your sensitivity to rights of the elderly in Simpson v. Providence Washington Insurance Group. As a legislator, I know that we in Congress have a tough job ahead to ensure that seniors are protected. What role do you think the Judiciary can play in advancing these same interests?

Our society as a whole is becoming more sensitive to the problems of the elderly, and the members of the judiciary should share in this growing awareness. The increasing number of elderly persons in our society will present new problems and legal categories should evolve to address them. I will be vigilant to enforce congressional statutes for the elderly and to ensure that the rights and claims of the elderly have full recognition in our decisional law.

16. In your October 1987 speech to the Sacramento Rotary Club you warn that we "will lose our freedom if we do not remain committed to the constitutional process, to ensure its adaption to the various crises of human affairs."

If you are confirmed as a member of the Supreme Court, you will no doubt be asked to address such crises and to protect our civil liberties. In those cases, it may be necessary for you to take an unpopular position and go against public opinion as well as the government.

As an example we can look to the 1942 decision of the Court on the internment of Japanese Americans. Although I was only a boy at that time, I remember that my father was one of the few people who publicly expressed his opposition to the internment. Even the Court gave in to the prevailing public hysteria and failed to protect the rights of these American citizens.

If you are in a situation where your interpretation of the Constitution demands that you make a very unpopular decision, is your personal constitution of such a nature that you can make such a decision and disregard public opinion? Are you willing to go all the way to preserve our freedom?

Some of the proudest moments in the history of the Supreme Court have occurred when the Court has stood firm against the tide of public opinion to safeguard the endangered rights of individuals and minorities. Many of the greatest Justices are known for their dissents from decisions in which the Court declined to protect minority or individual rights. These Justices' examples are an inspiration to the judiciary.

If confirmed, my duty as an Associate Justice of the Supreme Court would be to apply the law irrespective of public opinion. It would be a breach of my oath and of my duties as a judge to consider the extent to which my ultimate decision would be popular or unpopular. I am confident that I will follow the constitution even if doing so is an ultimate test of personal courage and integrity.

17. You have held membership in several private clubs with discriminatory membership policies. You belonged to the Olympic Club, which had a "white male only" policy when you joined, from 1962 until the day you were asked by the Justice Department to come to Washington to discuss your nomination. You belonged to the Del Paso Country Club, which has no black and few women members, from 1963 until just a few weeks ago. And you belonged to the Sutter Club, which excludes women and has few minority members, from 1963 until 1980.

You said, in answer to Senator Kennedy, that you did not resign earlier in part because you have become more sensitive over the years, and that you are still continuing to educate yourself. I commend you for that, and for your candor in expressing it.

However, I am concerned because the matter of membership in discriminatory private clubs is not just a question of personal morality when you are a federal judge. The ABA Code of Judicial Conduct states that it is "inappropriate" for a judge to hold such membership. I understand that you were a member of the ABA committee that recommended this.

Why did you not resign when the ABA adopted this policy? Do you believe intent to harm is required before discrimination is invidious? If so, why?

First, let me correct one statement in the question. I have been a member of the Advisory Committee on Codes of Conduct, Judicial Conference of the United States, from 1979 to the present. But I have not been a member of the ABA Committee that recommended the provision in the ABA Code of Judicial Conduct to which the question refers.

The commentary to the ABA Code of Judicial Conduct was amended in 1984 to discuss membership in organizations that practice invidious discrimination. In part, that amendment stated that it was "inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. . . . Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive."

I became a member of the Sutter Club on December 10, 1963, and resigned from membership on about September 31, 1980. To the best of my knowledge, during the period of my membership the Sutter Club had members of some racial minority groups, but not women members. I believe that the Sutter Club precluded women largely as a matter of practice. While the bylaws did not explicitly prohibit female membership, one reference to "men" implied that membership was restricted. I understand that the bylaws have been amended recently to substitute "person" for "men." In 1980, after advising the club of my concerns about its practices, I resigned. I believed that the members there knew me as a judge, and in view of the club's membership policy, I believed it would create an inappropriate appearance for me to continue to belong to this club. My resignation preceded the ABA Committee's amendment to the Judicial Code by several years.

I became a junior member of the Del Paso Country Club in 1958 and a full member in 1963. I tendered my resignation on October 22, 1987. To the best of my knowledge, during the period of my membership the club had some women members and members of some racial minority groups.

I became a member of the Olympic Club in 1962 and tendered my resignation on October 27, 1987. To the best of my knowledge, this club had members from some racial minorities, but no women full members, during the period of my membership.

Last summer, after reading an article in the New Yorker magazine, which talked about the egalitarian history of the Olympic Club, I wrote a letter to the club that expressed my concerns about the club's restrictions on female membership and the continuing perception of restrictive practices concerning minority members. I urged the club to make the egalitarian spirit

a reality. Both orally and in writing, I urged the club to amend its bylaws to permit women members and to encourage applications from women and racial minorities. The membership, however, voted against the board of director's proposal to amend the club's bylaws to promote those objectives. I was not a voting member and could not vote.

After the vote, I expressed in writing my intention to resign, and requested a meeting with the board of directors and the president to encourage the board to continue on its attempted course of changing membership policy. Because of events surrounding my nomination, I was unable to meet promptly with the board, and thereafter tendered my formal resignation. In view of my own and the board of director's continuing efforts to reform the Olympic Club from within and our prospects of success in those efforts, I do not believe that my resignation from this club was belated.

As I understood the language of the ABA amendment, "invidious discrimination" suggests an exclusion of particular persons based on sex, race, religion, or national origin that is intended to impose a stigma on such persons. As far as I am aware, none of the policies or practices were the result of ill-will. However, there is no question but that a hurt and an injury can be done, even if unintentionally.

Finally, as your question notes, I have testified before the Senate Judiciary Committee as to my growing recognition that discrimination comes from several sources -- sometimes from active hostility, but sometimes too from insensitivity or indifference. Transcript of Hearings, December 14, 1987, Afternoon Session. I have tried to continue to educate myself over the years to the existence of subtle barriers to the advancement of women and minorities in our society. As I affirmed in answer to Senator Kennedy, I want to see a society in which women and minorities have equal opportunities to join a club where they can meet other persons in their community. Transcript of Hearings, December 14, 1987, Afternoon Session.

Please also refer to my answers to Senator Levin's written questions on this point.

ANSWERS TO QUESTIONS FROM SENATOR LEVIN

1. Before the President announced his decision to nominate you, did any member of the White House staff or the Justice Department ask you any questions relating to, or did you comment on your views relative to, the following: abortion, affirmative action, capital punishment, school prayer, independent counsel, the standing of Congress to bring suit against the Executive Branch, separation of church and state, and the rights of defendants in criminal cases? If so, please describe to the best of your recollection the content of all such questions, and your comments, including an indication of who was present.

As I testified to the Committee on the Judiciary, Transcript of Hearings, December 14, 1987, Afternoon Session, no member of the White House staff or the Justice Department asked me any questions which directly or indirectly solicited my views on the subjects listed in your inquiry or on any other subject that might come before the Supreme Court for consideration. Further, I have not commented on, offered, or volunteered those views to any member of the White House staff, the Justice Department, or any other part of the administration.

2. Please set forth, in as much detail as you remember, specifically what you said to Senator Helms about your personal views, opinions, feelings, etc., relative to abortion.

As I testified to the Committee on the Judiciary, Transcript of Hearings, December 14, 1987, Afternoon Session, I did not say anything to Senator Helms concerning my personal views, opinions, or feelings about abortion or any other subject that might come before the Supreme Court for consideration. In all my discussions with members of the Senate, including my meeting with Senator Helms, I have taken the position that my religion may be of some relevance as to character and temperament, but that my religious beliefs, or any views on the subject of abortion, are a private matter that I will not consult in making a judicial decision. I also told Senator Helms that I obviously was aware of the depth of feeling that he has on this subject, but further indicated that as a judge I maintain a fair and open mind on the issue, so that I can resolve any particular case consistently with the law and the Constitution. Our pluralistic society allows us to admire persons with views and opinions based on a moral code, but such views are not, and should not, be an indication how a judge will rule when interpreting the law in any particular case.

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3. In the Senate Judiciary Committee's questionnaire, you responded to several questions concerning your membership in business clubs, social clubs, or fraternal organizations. One of these questions asked for your opinion as to whether any of the clubs or organizations you have belonged to practices invidious discrimination and other forms of discrimination. In the questionnaire, you defined the term "invidious discrimination" by explaining that it "suggests that the exclusion of particular individuals on the basis of their sex, race, religion or national origin is intended to impose a stigma on such persons." (p. 50, emphasis added). In a response to Senator Kennedy, you further explained that "discrimination comes from several sources. Sometimes it's active hostility, and some sometimes it's just insensitivity and indifference." (transcript, December 14, 1987, p. 137).

Can you give some real life examples of when discrimination against women and blacks would not be invidious? In your opinion, was the discrimination against women and blacks by the Olympic Club, during your membership, invidious?

I undertook in my response to the Judiciary Committee's Questionnaire, at page 50, to define the phrase "invidious discrimination" because the question to which I was responding specifically referred to the 1984 amendments to the ABA Code of Judicial Conduct which use that phrase. However, I did not say or imply that such legalistic interpretations provide an appropriate basis for individuals or organizations to justify their conduct. I believe that discrimination against women, blacks, or other minorities imposes real injury and is wrong whether it arises from intentional, active bias or from indifference and insensitivity. While I believe that the membership practices of the Olympic Club were not invidious in the sense intended by the ABA Code because they were not animated by ill-will, I disagreed with those practices, and when my efforts to change them were unavailing, I resigned.

Please refer also to my answers to Senator Simon's written questions on this point.

ADDITIONAL SUBMISSIONS FOR THE RECORD

AMERICAN FEDERATION
OF LABOR AND CONGRESS
OF INDUSTRIAL ORGANIZATIONS

UNION YES

Executive Council Members

Lane Kirkland
President
Thomas R. Donahue
Secretary-Treasurer
Frederick O'Neal
Albert Shanker
Edward T. Hanley
Angelo Fosco
Kenneth T. Blaylock
William W. Winpisinger
William H. Wynn
John DeConcini
Wayne E. Glenn
Joyce D. Miller
John J. Sweeney
Frank Drozak
James E. Hatfield
Barbara Hutchinson
Richard I. Kilroy
Vincent R. Sombrotto
Gerald W. McEntee
William H. Bywater
Marvin J. Boede
Patrick J. Campbell
Owen Bieber
John T. Joyce
Lynn R. Williams
Morton Bahr
Larry Dugan Jr.
Robert A. Georgine
Milan Stone
Gene Upshaw
Jay Mazur
Lenore Miller
Jack Sheinkman
John J. Barry
John A. Gannon
Jackie Presser

January 22, 1988

The Honorable Joseph Biden
Chairman, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Re: Nomination of Anthony M. Kennedy to be Associate Justice of the United States Supreme Court

Dear Senator Biden:

The AFL-CIO hereby requests that this letter -- which states its views on the nomination of Judge Anthony M. Kennedy to be an Associate Justice of the Supreme Court of the United States -- be made part of the hearing record on the nomination. Very simply stated, it is our position that while Judge Kennedy is far from the individual we would hope for in a Supreme Court nominee, taking the circumstances into account, we believe that the national interest is served by his confirmation.

In a number of areas of critical concern to working people, Judge Kennedy's record on the United States Court of Appeals for the Ninth Circuit is quite troubling, and his record is only somewhat reassuring in other areas. Judge Kennedy has, to this point, shown only a limited appreciation of the legitimate needs and aspirations of women, of minorities, and of the other members of this society who, over the years, have been denied equal rights and opportunities. It is a matter of particular concern to us that he has taken an unduly narrow view of the rights of workers and of their unions.

If our position were based solely on our review of Judge Kennedy's judicial record, we would therefore oppose his confirmation. We come out the other way because of considerations regarding the legitimate roles of the President and the Senate in the selection of Supreme Court Justices, the public perception of the Court and its role in our national life, and the tumultuous history of the President's efforts to fill the current vacancy on the Court. It is out of regard for these considerations that we support confirmation.

1. At the outset, we wish to reaffirm our conviction that it is entirely proper for the Senate, as the broadly representative body that it is, to evaluate and consider the judicial philosophy of a Supreme Court nominee and to assure itself that the confirmation of the nominee, taking all relevant factors into account, will serve the good of the country. A judge's social, political, and legal values are proper concerns for the Senate, and the Senate may legitimately demand that its own social, political and legal values are to a significant degree reflected in any nomination.

Chief Justice Rehnquist was correct when, almost 30 years ago, he wrote: "what could [be] more important to the Senate than [a nominee's] view on equal protection and due process."1/ And, as Professor Charles Black has added,

> "In a world that knows that man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only be treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote."2/

The AFL-CIO has repeatedly endorsed the Senate's prerogatives and responsibilities in this regard; in the recent national debate generated by the nomination of Judge Robert H. Bork, the public also has unambiguously added its endorsement.

2. We hasten to add that we are <u>not</u> saying that it would be appropriate for the Senate to refuse to confirm each and every nominee who does not share, in all particulars, the social, political and legal beliefs of a majority of the Senators. Nor would it be responsible for the AFL-CIO (or for any other group) to urge rejection of a nominee simply because that nominee is not within the class of individuals who we would choose had we the right to choose.

1/ Rehnquist, <u>The Making of a Supreme Court Justice</u>, The Harvard Record (Oct. 8, 1959) p. 7.

2/ Black, <u>A Note on Senatorial Consideration of Supreme Court Nominees</u>, 79 Yale L.J. 657, 663-64 (1970).

The selection of a Supreme Court Justice is a unique civic event that engages the two representative branches of government in the constituting of the third branch. That being so, it is of the essence that both the President and the Senate seek in good faith to reach agreement and that neither the President nor the Senate treat the make-up of the Court as simply one more incident in their on-going political and institutional struggles.

The Supreme Court's standing rests on the extent to which the public, in all its diversity, broadly accepts the Court's process of decision as an expression of the ideal embodied in the concept we signify by the term the "law." Although a judge's social and political vision will inevitably play some role in legal analysis, the concept of deciding according to "law" is, of course, infinitely more complex than deciding simply according to the judge's individual predilections, prejudices or social or political philosophy.

Given the basic values stated in the Constitution, the Senate must assure itself that those who reach the Court begin from the understanding that individual rights be broadly recognized and vigorously protected. But more is necessary to preserve public trust: the process as a whole must reassure that the Court is an institution dedicated to reasoned legal deliberation. This requires that the selection process not degenerate into one in which a particular political party or faction simply seeks to prevail over all others as a means of appointing Justices who will decide according to the prevailing group's agenda.

The Supreme Court's status as an institution to be celebrated and respected in our public life thus requires that both the President and the Senate -- each of which are representatives of the public -- treat the appointment process as an aspect of statecraft, calling for an effort to reach consensus.

3. We believe that to some degree the nomination of Judge Kennedy represents an effort by the Administration to take such a conciliatory approach; albeit an effort taken only after the highly divisive controversies sparked by its first two nominations for this vacancy. We believe, too, that the likely costs to the nation of another divisive confirmation battle over this nomination outweigh our concerns -- as deeply felt as those are -- regarding the consequences of the Senate confirmation. In reaching this conclusion we have given three factors great weight.

This nomination -- unlike the two prior nominations -- does not reflect an Administration effort to effectuate a sudden and major shift in the direction of the Court. We objected to the nomination of Judge Bork because it was plain on the record that this Administration, in making that nomination, was intent on undermining fundamentally just legal developments supported by the overwhelming majority of the nation. We do not wish to minimize either the possible influence that Judge Kennedy may have on the Court or the degree to which we will likely disapprove of some of his positions. But, unlike the President's first nominee, Judge Kennedy does not espouse a substantive agenda that begins from the proposition that many of the well accepted developments in such areas as equal protection, due process, and the guarantee of free speech are fundamentally illegitimate.

Judge Kennedy -- again in contrast to Judge Bork -- shows no sign of being attracted to eccentric and rigid theories of jurisprudence that would freeze the meaning of the Constitution by referring only to a simplified view of original intent. It has long been accepted that judges in interpreting the Constitution should, among other sources, look to our historical experiences and our broadly held social values. It is this way that practical meaning and modern application are given to the Constitution's expansive civil rights and civil liberties guarantees. Judge Kennedy -- whatever his other limitations -- appears to approach his responsibilities through this grand tradition of constitutional interpretation.

Finally, Judge Kennedy's opinions generally decide only those issues necessary to the resolution of the specific cases before him; he is not given to using his judicial office to run the society rather than to decide concrete cases and controversies. It is our hope that this reflects that sense of proportion which is essential to the proper exercise of judicial power as well as that sense of human fallibility which is essential to the maintenance of the spirit of tolerant respect for diversity and for individual liberty.

For all these reasons we view Judge Kennedy's nomination as a step away from the partisan extremism reflected in this Administration's earlier nominations, and a step towards consensus based on a decent respect for a wide range of opinion.

4. Notwithstanding our ultimate conclusion on the nomination of Judge Kennedy we would be less than frank -- and less than faithful to our obligations -- if we did not lay out for

the public record the basis for the misgivings we have voiced. This is neither the time nor place to recite chapter and verse. It suffices to say that our reading of the cases indicate that, whether consciously or not, Judge Kennedy has failed to separate his own political and social biases from his legal analysis in certain areas, and that the result has been a substantial number of seemingly result-oriented decisions. Judge Kennedy's treatment of the rights that workers and their unions have secured through their social and political struggles is illustrative.

In our examination of Judge Kennedy's labor law cases, we found that in virtually every case where significant and unsettled issues were presented, Judge Kennedy sided with management. His decisions in favor of unions and/or workers have been confined to settled issues that could generate no major controversies. We do not contend that he uniformly supported indefensible positions or that he never supported unions or workers regardless of the law. But the pattern we found nevertheless reflects a double standard based on a far more open and forthcoming attitude toward the interests and concerns of management than toward those of working people. In effect, he has shown a strong presumption that, on any open issue, the law favors management and opposes workers and their unions.

Our assessment of this aspect of Judge Kennedy's record does not rest simply on our own subjective assessment of his positions. For example, a statistical examination of his voting record (which we are attaching) reflects that over his 12 year career he has voted to deny enforcement to fully one-third of all NLRB orders challenged by managements, while he has never voted to deny enforcement to an NLRB order that was adverse to a labor union. It is this "inexorable zero," Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977), rather than any subtlety of statistical analysis, that creates an unavoidable inference of decision-making infected by anti-union bias. This conclusion is further buttressed by the fact that on three separate occasions Judge Kennedy has adopted a legal position adverse to unions and/or workers regarding a controversial and important legal question, and the Supreme Court, in unanimous or near-unanimous decisions, has then rejected that position and ruled in favor of the union/worker contentions.3/

3/ In Financial Institution Employees v. NLRB, 750 F.2d 757, 758 (9th Cir. 1985), Judge Kennedy argued in a dissent from his court's denial of en banc rehearing that the NLRB properly held

(footnote continued)

This pattern is especially disturbing in an area like labor law, where the issues are generated by congressional enactments. When interpreting statutes, a judge properly acts only to effectuate the values of the legislature, and not his own. The AFL-CIO accepts the primacy of the legislature in making social policy and does not place its faith in judges who cannot separate their own biases -- one way or the other -- from their analyses of legislative will.

5. We end as we began: our concerns about Judge Kennedy do not rise to the level that, given all the relevant factors, cause us to call for his rejection. With all of his faults, this nominee is far superior to those who were previously put forward by this Administration to fill the current Supreme Court vacancy. When all is said and done there is reason for guarded

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(Footnote 3/ continued)

that labor unions could not freely merge with each other without placing their representation rights in question. On review, the Supreme Court unanimously rejected this new and controversial NLRB. See NLRB v. Financial Institution Employees, 106 S.Ct. 1007 (1986).

In Pacific Northwest Chapter v. NLRB, 609 F.2d 1341 (9th Cir. 1979), Judge Kennedy joined an opinion deciding that the NLRB was insufficiently restrictive of union rights in the construction industry. His pro-management position was first rejected by the en banc Ninth Circuit, 654 F.2d 1301, and then by a unanimous Supreme Court. See Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 646 (1982).

In Kaiser Engineers v. NLRB, 538 F.2d 1379 (9th Cir. 1976), Judge Kennedy dissented from an opinion approving of a long-standing NLRB position that workers could not legally be discharged for acting collectively to obtain workers protection measures from government. The Supreme Court upheld the NLRB -- and rejected Judge Kennedy's position -- by a 7-2 vote. Eastex v. NLRB, 437 U.S. 556 (1978).

While in Financial Institution Employees, Judge Kennedy argued that the NLRB was entitled to extreme deference in its legal holdings, in Pacific Northwest and Kaiser Engineers -- where he called for reversal of pro-union NLRB decisions -- he wholly ignored the issue of deference.

optimism that Judge Kennedy has the qualities of heart and mind to respond to the responsibilities we place on the Supreme Court in the same manner as have others who have become Justices: by showing a heightened sensitivity to the legitimate diversity of interests that characterize our polity and our law. That being so, a continuing stalemate between the President and Senate would be more destructive of the public's confidence in the system stated in the Constitution for filling Supreme Court vacancies -- and possibly of confidence in the Court itself -- than it would be productive of a Supreme Court better fitted to its important tasks. We therefore urge that Judge Kennedy's nomination be confirmed.

Sincerely,

Lane Kirkland
President

ATTACHMENT

JUDGE KENNEDY'S RECORD IN NLRA CASES*/

	NLRB order in favor of union position	NLRB order in favor of employer position
Kennedy votes to enforce NLRB order	30 cases (including 6 majority opinions; 5 concurring opinions; & 0 dissenting opinion)	11 cases (including 3 majority opinions; 2 concurring opinions; & 1 dissenting opinion)
Kennedy votes to deny enforcement of NLRB order	15 cases (including 4 majority opinions; 1 concurring opinion; & 1 dissenting opinion)	0 cases

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*/ This chart includes 12 cases where the court was confronted with both employer and union challenges to the NLRB decision and order and where the court's decision accepted some claims made by the employer and some by the union. These "divided" cases are characterized in the chart according to which side prevailed in the majority of issues, or, if there was not a clear majority of issues on one side, according to which side prevailed on the issue of liability (as distinct from remedy). If all cases in which there are such "divided" results are removed from consideration, there is no change in the relative results:

	NLRB order in favor of union position	NLRB order in favor of management position
Kennedy votes to enforce NLRB's order	21 cases (including 4 majority opinions; 3 concurring opinions; & 0 dissenting opinions)	11 cases (including 3 majority opinions; 2 concurring opinions; & 1 dissenting opinion)
Kennedy votes to deny enforcement of NLRB's order	12 cases (including 4 majority opinions; 1 concurring opinion; & 1 dissenting opinion)	0 cases

The only case which might possibly be classified as support for a union challenge to an NLRB order is one of these "divided" cases, Press Democrat Publishing Co. v. NLRB, 629 F.2d 1320 (9th Cir. 1980). Most of the issues presented were challenges to the NLRB's order by the employer, all of which were rejected; but on one issue of remedy there was a union challenge, which the panel remanded back to the NLRB for further explanation.

Positions Taken by Judge Kennedy in National Labor Relations Board Cases

NLRB decided in favor of union; Kennedy would enforce NLRB order

MAJORITIES

NLRB v. Circle A&W Products Co., 647 F.2d 924 (9th Cir. 1981), cert. denied, 454 U.S. 1054 (1981)

Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403 (9th Cir. 1978) (enforces on most issues)

Scintilla Power Corp. v. NLRB, 707 F.2d 419 (9th Cir. 1983)

Union Oil v. NLRB, 607 F.2d 852 (9th Cir. 1979)

NLRB v. Mike Yurosek & Sons, Inc., 597 F.2d 661 (9th Cir. 1979), cert. denied, 444 U.S. 839 (1979)

H.C. Macaulay Foundry Co. v. NLRB, 553 F.2d 1198 (9th Cir. 1977) (union found liable by NLRB & didn't appeal; employer appealed early termination of union damage exposure, and union wins on that issue)

DISSENTS/CONCURRENCES

Raley's Inc. v. NLRB, 703 F.2d 410 (9th Cir. 1983) (concur), aff'd as to these grounds after rehearing en banc in which Kennedy was not involved, 728 F.2d 1274 (9th Cir. 1984) (NLRB found for union on 4 grounds; order enforced as to 3)

NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979) (concur)

Dycus v. NLRB, 615 F.2d 820 (9th Cir. 1980) (concur)

Bell Foundry v. NLRB, 827 F.2d 1340 (9th Cir. 1987) (concur)

NLRB v. International Medication Systems, Ltd., 640 F.2d 1110 (9th Cir. 1981), cert. denied, 455 U.S. 1017 (1982) (concur) (NLRB enforced re unfair labor practices, but remanded re reinstatement due to improperly excluded evidence)

VOTES

NLRB v. Marin Operating, Inc., 822 F.2d 890 (9th Cir. 1987)

NLRB v. Carson Cable TV, 795 F.2d 879 (9th Cir. 1986)

NLRB v. Realty Maintenance, Inc., 723 F.2d 746 (9th Cir. 1984)

NLRB v. Yellow Transportation Co., 709 F.2d 1343 (9th Cir. 1983)

NLRB v. Elixir Industries, 682 F.2d 867 (9th Cir. 1982)

NLRB v. Dick Seidler Enterprises, 666 F.2d 383 (9th Cir. 1982)

East Wind Enterprises v. NLRB, 664 F.2d 754 (9th Cir. 1981)

NLRB v. Pacific Coast Utilities Service, Inc., 638 F.2d 73 (9th Cir. 1980)

Universal Paper Goods v. NLRB, 638 F.2d 1159 (9th Cir. 1979)

Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721 (9th Cir. 1980), cert. denied, 451 U.S. 906 (1981)

Press Democrat Publishing Co. v. NLRB, 629 F.2d 1320 (9th Cir. 1980) (pro-union NLRB outcome approved, but case remanded for NLRB to state reasons why a more favorable order had not been issued)

NLRB v. Silver Spur Casino, 623 F.2d 571 (9th Cir. 1980) (enforced as to 5 of 7 issues)

NLRB v. Chatfield-Anderson Co., Inc., 606 F.2d 266 (9th Cir. 1979) (pro-union NLRB order enforced as to unfair labor practice finding, but not as to appropriateness of bargaining order)

NLRB v. Tri-Ex Tower Corp., 595 F.2d 1 (9th Cir. 1979)

Stromberg-Carlson Communications, Inc. v. NLRB, 580 F.2d 939 (9th Cir. 1978)

NLRB v. Tri-City Linen Supply, 579 F.2d 51 (9th Cir. 1978)

Great Chinese American Sewing Co. v. NLRB, 578 F.2d 251 (9th Cir. 1978) (NLRB for union on 6 out 7 issues; 9th Cir. enforced in its entirety)

NLRB v. Squire Shops, Inc., 559 F.2d 486 (9th Cir. 1977)

NLRB v. Magnusen, 523 F.2d 643 (9th Cir. 1975) (enforcement granted as to unfair labor practice, and as to reinstatement with back pay for 2 out of 3 employees)

NLRB decided in favor of union;
Kennedy would deny enforcement

MAJORITIES

May Department Stores, Inc. v. NLRB, 707 F.2d 430 (9th Cir. 1983)

NLRB v. HMO International/California Medical Group Health Plan, 678 F.2d 806 (9th Cir. 1982)

Doug Hartley, Inc. v. NLRB, 669 F.2d 579 (9th Cir. 1982)

NLRB v. International Harvester Co., 618 F.2d 85 (9th Cir. 1980)

DISSENTS/CONCURRENCES

NLRB v. Heyman, 541 F.2d 796 (9th Cir. 1976) (concur)

Kaiser Engineers v. NLRB, 538 F.2d 1379 (9th Cir. 1976) (dissent)

VOTES

Idaho Falls Consolidated Hospitals, Inc. v. NLRB, 731 F.2d 1384 (9th Cir. 1984) (enforcement denied as to all contested issues over which Court has jurisdiction)

NLRB v. Consolidated Liberty, Inc., 672 F.2d 788 (9th Cir. 1982)

NLRB v. Masonic Homes of California, 624 F.2d 88 (9th Cir. 1980)

NLRB v. Sacramento Clinical Laboratory, Inc., 623 F.2d 110 (9th Cir. 1980) (enforcement denied as to 2 of 3 issues)

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB, 609 F.2d 1341 (9th Cir. 1979)

NLRB v. Aladdin Hotel Corp., 584 F.2d 891 (9th Cir. 1978)

Merchants Home Delivery Service, Inc. v. NLRB, 580 F.2d 966 (9th Cir. 1978)

NLRB v. Yama Woodcraft, Inc., 580 F.2d 942 (9th Cir. 1978)

NLRB v. Four Winds Industries, Inc., 530 F.2d 75 (9th Cir. 1976) (NLRB order in favor of union denied enforcement on 2 of 3 issues)

NLRB decided against union;
Kennedy would enforce NLRB order

MAJORITIES

Service Employees Int'l Union v. NLRB, 640 F.2d 1042 (9th Cir. 1981)

United Association of Journeymen v. NLRB, 553 F.2d 1202 (9th Cir. 1977)

NLRB v. Retail Clerks Union, 526 F.2d 142 (9th Cir. 1975)

DISSENTS/CONCURRENCES

Hotel Employees & Restaurant Employees Union v. NLRB, 760 F.2d 1006 (9th Cir. 1985) (concur)

International Association of Machinists v. NLRB, 759 F.2d 1477 (9th Cir. 1985) (concur)

NLRB v. Machinists Local 1327, 608 F.2d 1219 (9th Cir. 1979) (dissent)

VOTES

Hotel, Motel and Restaurant Employees Union v. NLRB, 785 F.2d 796 (9th Cir. 1986)

United Stanford Employees v. NLRB, 601 F.2d 980 (9th Cir. 1979)

NLRB v. International Long Shoreman's Union, 581 F.2d 1321 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979)

NLRB v. Int'l Union of Operating Engineers, 580 F.2d 359 (9th Cir. 1978)

Carpenters Local 470, United Brotherhood of Carpenters v. NLRB, 564 F.2d 1360 (9th Cir. 1977)

NLRB decided against union;
Kennedy would deny enforcement

MAJORITIES

None

DISSENTS/CONCURRENCES

None

VOTES

None

Alliance for Justice

A National Association of Organizations Working for Equal Justice

600 New Jersey Avenue, N.W. ■ Washington, D.C. 20001 ■ 202/862-9548

NAN ARON
Executive Director

FRANCES DUBROWSKI
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Equal Rights Advocates

Food Research and Action Center

Harmon & Weiss

Institute for Public Representation

Juvenile Law Center of Philadelphia

Mental Health Law Project

National Education Association

NOW Legal Defense and Education Fund

National Wildlife Federation

National Women's Law Center

Native American Rights Fund

Natural Resources Defense Council

New York Lawyers for the Public Interest

Public Advocates, Inc.

Rosman, Reno & Cavanaugh

Sierra Club Legal Defense Fund

Women's Law Project

Women's Legal Defense Fund

STATEMENT OF THE ALLIANCE FOR JUSTICE'S JUDICIAL SELECTION PROJECT TO THE SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF ANTHONY M. KENNEDY TO THE UNITED STATES SUPREME COURT

Submitted on January 22, 1988

STATEMENT OF THE ALLIANCE FOR JUSTICE'S
JUDICIAL SELECTION PROJECT

This testimony is submitted on behalf of the Alliance for Justice and its Judicial Selection Project on the nomination of Anthony Kennedy to the United States Supreme Court. The Alliance for Justice is a national association of public interest organizations which addresses issues of common concern to the public interest community, such as access to the courts for those who assert violations of constitutional and federal rights.

The Alliance's Judicial Selection Project was organized in 1985 by a group of law professors and civil rights, public interest and labor organizations. The Project monitors the appointment and confirmation of candidates for the federal judiciary and encourages the racially diverse selection of men and women who are open-minded, fair and committed to equal justice. The Project believes that maintaining a strong, independent judiciary is essential to our democratic system.

The Judiciary Committee hearings on the nomination of Judge Bork served as an historic demonstration of the Senate's constitutional role as full partner with the President in the confirmation of Supreme Court candidates. The Committee's extensive review of Judge Bork's record and its rigorous questioning on his views on the Constitution set a standard for Senate consideration of all future nominees to the Court. In rejecting the nomination, the Senate showed that it must be assured that a Supreme Court nominee will respect the role of the

courts in protecting individual rights and liberties.

Accordingly, the Senate must now examine Judge Kennedy's record and inquire into his understanding of the Constitution. After a careful review of Judge Kennedy's appellate opinions as well as speeches he has made over a period of several years, the Alliance is troubled by Judge Kennedy's lack of demonstrated commitment to equal access to the courts and equal justice.

Over the last thirty years, courts have gradually reduced the barriers that have prevented the poor and other underrepresented individuals from gaining access to the federal courts. There is widespread recognition of the principle that where constitutional rights have been or may have been violated, those who can show specific even if small individual injury will have their day in court.

Several decisions by Judge Kennedy indicate that he takes a narrow and mechanical view of citizens' ability to seek redress for grievances in the courts. He has demonstrated a tendency to read the law governing access to the courts in such a narrow way as to deny underrepresented persons full protection of the law.

For instance, in TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976), Judge Kennedy, writing for the court, refused to uphold a district court's grant of standing to a fair housing organization which had challenged the racial steering practices of realtors under the Fair Housing Act. He ruled that the Act conferred standing only on individuals who are the "primary

victims" of discrimination. He wrote:

> "The injuries [the organization's] members may have suffered from living in segregated communities were caused by no specific single act of the defendants, but by a prolonged practice spanning many years. An injunction, if granted, would stop the practice of racial steering by the defendants, but the desired result of establishing an integrated community would not be achieved immediately....In sharp contrast is the denial of access to one seeking to rent or purchase housing, where inability to obtain an immediate judicial remedy may constitute a serious hardship." 532 F.2d at 1276.

At the time, Judge Kennedy's ruling conflicted with nine other federal court decisions holding that persons other than specific victims had standing to challenge discriminatory housing practices. Indeed, in a 7-2 decision written by Justice Powell three years later, Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), the Supreme Court expressly rejected Judge Kennedy's reasoning.

In another civil rights lawsuit, Pavlak v. Church, 681 F.2d 617 (1982), Judge Kennedy wrote for a divided panel that the statute of limitations for a putative class member was not tolled between the filing of the complaint and the order refusing to certify the class. This decision was vacated by the Supreme Court, 103 S. Ct. 3529 (1983) in light of its decisions in Crown, Cork and Seal v. Parker, 103 S.Ct. 2392 (1983) and Chardon v. Soto, 103 S.Ct. 2611 (1983).

Other examples reveal his hypertechnical interpretation of statutes of limitations. One particularly disturbing case is Allen v. Veterans Administration, 749 F.2d 1386 (9th Cir. 1984), where the plaintiff filed a Federal Tort Claims Act action within

the six months permitted by law, but named and served the Veterans Administration, not the United States, as defendant. Formal service was made on the U.S. Attorney two months later, although he had already received the papers from the agency. Judge Kennedy upheld the district court's dismissal of the complaint on the grounds of failure to name the United States and refused leave to amend Under Rule 15 because the U.S. Attorney was not served before the statute ran out. Judge Kennedy said that the fact that the action was filed and the V.A. was served within the allowable time was irrelevant.

His decision in Allen was troubling since the substitution of an agency for the United States is common and he relied on a minor pleading error to dismiss the plaintiff's case. He also used an unduly technical analysis to dismiss the employment discrimination case, Kouky v. Department of the Navy, 820 F.2d 300 (9th Cir. 1987). The plaintiff mistakenly named the agency, not the agency director, as provided by statute. Judge Kennedy disregarded the fact that the agency director was served six days later (after the time expired).

In a similar vein, Judge Kennedy has interpreted the substantive law of race and sex discrimination in a narrow fashion. A common theme running through his cases is the requirement of proof of discriminatory intent. This has led him to reject many important claims of discrimination.

For instance, in Spangler v. Pasadena Board of Education, 611 F.2d 1239 (9th Cir. 1979), Judge Kennedy wrote a lengthy opinion concurring in the termination of district court

jurisdiction of the Pasadena school desegregation plan. The district court had denied the school board's motion to relinquish jurisdiction, finding that school board members, who had been cited thirteen times for noncompliance with the court order, had criticized the desegregation plan and intended to return to neighborhood school assignments that existed prior to implementation of the plan, thus restoring the previously existing pattern of segregation.

Judge Kennedy refused to accept the district court findings and in so doing violated the longstanding rule that requires deference to the findings of fact by the district court. Despite the overwhelming weight of evidence, he argued that substantial noncompliance had not been shown and wrote that "the evidence does not support the conclusion that the school board harbors an intent to establish, or return to, a dual system." Id. at 1244.

Judge Kennedy's opinion demonstrates a lack of sensitivity to the continuing battle to ensure equal educational opportunity. His opinion was followed in the recent Norfolk School case, Riddick v. School Board of Norfolk, 784 F.2d 521, 537-38 (4th Cir. 1986), in which the Fourth Circuit allowed the Norfolk School Board to eliminate busing and resegregate its elementary schools, resulting in ten formerly desegregated schools becoming 95 percent or more black and six becoming 70 percent or more white.

In Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979), Judge Kennedy upheld an at-large city council election in an

opinion which ignored factual evidence indicating substantial dilution of minority votes. His opinion could have precluded all future constitutional challenges to at-large elections in the Ninth Circuit were it not for an amendment to the Voting Rights Act in 1982. In Aranda, Hispanic plaintiffs had challenged San Fernando's at-large elections, in place for over sixty years. While the population of the city was 50 percent Hispanic, with 29 percent of the registered voters Hispanic, only three Hispanics had ever been elected to the City Council. The plaintiffs also presented evidence that Hispanic pollsters were routinely harassed and that polling places were seldom located in Hispanic homes. The district court granted summary judgment to the defendants, thus denying the plaintiffs a trial on the merits. The Ninth Circuit affirmed, largely adopting the district court's opinion.

In a concurring opinion, Judge Kennedy first failed to address the legal principles applicable to summary judgment motions, and thus violated the settled rule that in reviewing motions for summary judgment, all inferences must be viewed in the light most favorable to the party opposing the motion. Judge Kennedy also required that the plaintiffs prove that discriminatory intent was the basis for the at-large system. He then refused to conclude that the facts could support an inference of discriminatory intent although the Supreme Court three years later in Rogers v. Lodge, 485 U.S. 613 (1982), held that facts similar to those alleged in Aranda supported an inference that discriminatory intent was behind the at-large

system.

In responding to criticism of his Aranda ruling during testimony before the Senate Judiciary Commitee, Judge Kennedy stated that he failed to consider facts suggesting relief other than vacation of the at-large election because the plaintiffs had asked only for elimination of the election. However, as Antonia Hernandez noted in her testimony before the Committee, Judge Kennedy's summary judgment dismissal precluded the plaintiffs from returning to court to establish liability which could provide the basis for a remedy within the discretion of the Court.

In American Federation of State, County, and Municipal Employees v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), Judge Kennedy reversed the district court ruling that 15,000 Washington state employees established a Title VII sex discrimination claim based on the "comparable worth" theory. The district court's findings that female state employees were the victims of pervasive wage discrimination were based on state-commissioned studies that identified a 20 percent wage disparity between male-dominated and female-dominated jobs of equal skill, effort, responsibility and working conditions.

In a lengthy opinion, Judge Kennedy overruled the careful and detailed fact-finding by the district court, concluding that intentional wage discrimination could not be inferred from Washington's continued use of market wages to establish salary levels. Judge Kennedy's presumption that the State's compensation system and its resulting salary inequities reflected

"prevailing market rates" was also improper since the trial court made no finding as to the impact of the free market on the compensation system. He also summarily rejected liability based on a disparate impact theory. He ruled that Washington's compensation system could not be subjected to a disparate impact analysis since it did not constitute a clearly defined employment practice. This interpretation was repudiated in Antonio v. Wards Cover Packing Co., 43 FEP Cases 130 (9th Cir. 1987).

In addition, Judge Kennedy's record does not reflect sensitivity to the civil rights of the handicapped. In Mountain View-Los Altos Union High School District, 709 F.2d 27 (1983), Judge Kennedy narrowly interpreted the Education for All Handicapped Children Act. He held that parents who transferred their disabled child to a private school were not entitled to receive reimbursement for tuition expenses, even if the parents' decision was subsequently upheld through the administrative process and the courts. The Supreme Court, in an opinion by Justice Rehnquist, unanimously held that the parents were entitled to reimbursement in School Committee of Town of Burlington v. Department of Education, 471 U.S. 359 (1985).

Judge Kennedy's memberships in clubs which have had either express discriminatory practices or that have few minority or women members raise additional concerns about his insensitivity to the interests of minorities and women. The commentary to the American Bar Association's Judicial Code of Conduct states "[i]t is inappropriate for a judge to hold membership in any organization that invidiously discriminates on

the basis of race, sex or religion." In his responses to the Senate Judiciary Committee Questionnaire, he stated that invidious discrimination exists when the exclusion is "intended to impose a stigma upon such persons." And, in testimony before the Judiciary Committee, he explained that he believed that none of the exclusionary policies were the result of ill will. This narrow interpretation of "invidious discrimination" suggests that Judge Kennedy may review discrimination claims in an overly technical manner.

While Judge Kennedy's record on civil rights and discrimination issues is not reassuring, his testimony and opinions demonstrate that in such areas as the First Amendment and criminal law he is not guided by a formula or sweeping judicial philosophy. He does not appear to have an agenda to reverse landmark Supreme Court cases in these or other areas of the law. Judge Kennedy also demonstrated a respect for deciding cases based on a proper understanding of precedent.

Judge Kennedy told the Senate Judiciary Committee that "[o]ver the years, I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and minorities. This [is] an issue on which I [am] continuing to educate myself." The Alliance hopes that Judge Kennedy will continue to grow more sensitive to the rights of the powerless in our society and the role the courts must continue to play in vindicating those rights.

STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION

TO THE SENATE JUDICIARY COMMITTEE

ON THE NOMINATION OF

JUDGE ANTHONY M. KENNEDY

PREPARED BY THE

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REPORT
ON THE CIVIL LIBERTIES RECORD OF
JUDGE ANTHONY M. KENNEDY

We have prepared a report on the judicial philosophy and civil liberties record of Anthony M. Kennedy, Judge on the U.S. Court of Appeals for the Ninth Circuit, who has been nominated for the position of Associate Justice of the United States Supreme Court. This report reviews Judge Kennedy's 400 authored opinions while on the bench,1/ as well as his unpublished speeches and testimony before the Senate Judiciary Committee in connection with the nomination.2/ The report focuses on Judge Kennedy's record in the following civil liberties areas: privacy, discrimination and its remedies, voting rights, rights of aliens, separation of powers, freedom of speech, freedom of religion, criminal law and procedure, access to the courts and due process.

1/ The report focuses on opinions that Judge Kennedy wrote (whether for the majority, concurring or in dissent), in order to distill Judge Kennedy's judicial philosophy from his own words.

2/ This report does not discuss written testimony recently submitted to the Committee by Judge Kennedy.

INTRODUCTION AND SUMMARY

Judge Kennedy has been on the bench for a dozen years and has participated in more than 1200 decisions. He does "not have an over-arching theory, a unitary theory of interpretation."3/ Nevertheless, in a February 1984 speech, Kennedy observed:

> My own judicial philosophy has been described by others as conservative, and therefore unlikely to accept doctrines which substantially expand the role of the courts. None of us likes a simple label to explain our thought, but the description is probably apt as a general rule.4/

He has also stated that "as to some fundamental constitutional questions it is best not to insist on definitive answers."5/

On the court of appeals, Judge Kennedy's record shows both a cautious application of precedent and considerable appreciation for constitutional values. As a matter of style, his opinions are refined, subtle and narrowly tailored to the facts at hand. When he joins the majority, Judge Kennedy often adds a few "remarks" of his own in a brief concurrence. He has authored quite a number of dissenting opinions, and not infrequently dissents from the full court's denial of rehearing en banc.

3/ Transcript of Proceedings, United States Senate, Committee on the Judiciary, Nomination Hearings of Anthony M. Kennedy To Be an Associate Justice of the Supreme Court, Dec. 15, 1987, at 16-18 [hereinafter, Hearing Testimony].

4/ A. Kennedy, Unpublished Speech, Sacramento Chapter of the Rotary Club, Sacramento, CA (Feb. 1984), at 6 [hereinafter Rotary Club Speech].

5/ A. Kennedy, Unpublished Speech, McGeorge European Studies Program, McGeorge School of Law of the University of the Pacific, Salzburg, Austria (Nov. 1980), at 11 [hereinafter, Salzburg Speech].

Judge Kennedy has written sparingly on key civil liberties issues such as freedom of speech, church-state relations, and discrimination and its remedies. In the area of privacy, Judge Kennedy has never had occasion to address issues affecting reproductive freedom.

Certain aspects of the nominee's judicial record are troubling. In particular, Judge Kennedy's decisions in the area of discrimination and its remedies raise serious concerns. He has very frequently rejected claims of discrimination based on sex or race. He has dismantled a desegregation decree in the face of resegregation. He has barred civil rights litigants from the federal courts on narrow and technical grounds. His notion of invidious discrimination reveals an insensitivity to the pervasive nature of systemic discrimination.

In contrast, Judge Kennedy's decisions in the First Amendment area are positive. His free speech opinions fit comfortably within current Supreme Court doctrine. Here, as in other areas of the law, Judge Kennedy is not prone to ideological digressions. Several opinions are quite strong in their recognition of core First Amendment values, particularly in the area of prior restraints.

Although he has not been receptive to claims of vote dilution on behalf of minorities, in other contexts Judge Kennedy has vigorously enforced the principle of one-person, one-vote. In the criminal law area, Judge Kennedy's decisions show sensitivity to the needs of law enforcement. They nevertheless

reflect a fair application of precedent. Even in the face of strong evidence of guilt, Kennedy has been willing to reverse criminal convictions where there is evidence of police misconduct or where the jury was not properly instructed on the law. On the other hand, Judge Kennedy has extended the "good faith" exception to the exclusionary rule and has narrowly construed the Fifth Amendment's protection against self-incrimination and double jeopardy.

Judge Kennedy's unpublished speeches and hearing testimony also provide insight to his views on civil liberties and the function of the Supreme Court. Above all, Judge Kennedy places great trust in the structure of government, which includes separation of powers and the independence of the states, to protect individual rights.6/ Indeed, after reviewing Judge Kennedy's unpublished speeches and hearing testimony, it is fair to conclude that in considering the various mechanisms for protecting rights, the nominee has a relatively diminished view of the importance of the substantive legal limits in the Bill of Rights, and a relatively enhanced view of the importance of structural protections, including state sovereignty. How he will resolve the tension between local government power and the Bill of Rights in particular instances is therefore cause for concern.

6/ See, e.g., A. Kennedy, Unpublished Speech, Sacramento Chapter of the Rotary Club, Sacramento, CA (Oct. 15, 1987), at 7 [hereinafter, Sacramento Rotary Club Speech].

Within the structural allocation of powers, Judge Kennedy stresses the importance of an independent judiciary. "[O]nce the independence of the judiciary is undermined," he states, "it can never be restored."7/ He urges, however, that the federal judiciary exercise a "morality of restraint" -- informed by the intent of the Framers -- when reviewing the actions of the political branches:8/

> [A] principled theory of constitutional interpretation necessarily requires that there must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers.
>
> * * *
>
> It seems to me that the doctrine of original intent is responsive to some of the concerns I have mentioned although I think original intent is best conceived of as an objective rather than a methodology.9/

7/ A. Kennedy, Unpublished Speech, Special Session of the Judges of the Ninth Circuit, Phoenix, AZ (Aug. 1978), at 25.

8/ A. Kennedy, Ninth Circuit Judicial Conference, "A Bicentennial Review of Separation of Powers: What is the Role of the Courts in Constitutional Interpretation?" (Aug. 21, 1987), at 6 [hereinafter, Ninth Circuit Speech].

9/ Id. at 4-5. See also A. Kennedy, Unpublished Speech, Los Angeles Patent Lawyers Assoc., Los Angeles, CA (Feb. 1982), at 8. At his confirmation hearings, Judge Kennedy was questioned repeatedly about original intent. In response to these questions, he elaborated somewhat on the sort of intent he views as relevant to constitutional interpretation:

> [A]ny theory which is predicated on the intent of the framers, [with] reference to what they actually thought about, is just not helpful.
>
> Then you can go one step further on the progression and ask, well, should we decide the problem as if the framers had thought about it?

(continued...)

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Moreover, he identifies "an unwritten constitution in every state" that ought to serve as "an additional brake," "an additional restraint" on judicial power:

> It's not a source of authority to interpret. And the unwritten constitution consists of our ethical culture, our shared beliefs, our common vision, and in this country, the unwritten constitution counsels the morality of restraint, and it applies to each branch of the government.
>
> And it teaches that any branch of the government which attempts to exercise its powers to the full, literal extent of the language of the Constitution is both indecorous and destabilizing to the constitutional order.10/

In Kennedy's view, lack of restraint injures the judiciary itself. "The issue of judicial independence and its legitimacy is a necessary part of the equation when one debates the legitimacy of a source or method of constitutional

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9/ (...continued)

> But that does not seem to be very helpful either.
>
> What I do [think] is that we can follow the intention of the framers in a different sense. They did do something. They made certain public acts. They wrote. They used particular words.
>
> And they wanted those words to be followed.

Hearing Testimony, Dec. 14, 1987, at 220; see also Dec. 15, 1987, at 9-10. According to Kennedy, "original intent, broadly conceived, ... is present in far more cases than we give it credit for." Hearing Testimony, Dec. 14, 1987, at 224. Thus, in "very many cases," Kennedy finds that "the ideas, the values, the principles, the rules set forth by the framers, are a guide to the decision." Id. at 224-25.

10/ Ninth Circuit Speech, supra, at 5-6.

interpretation. If we overreach, it is fair to call our commissions into question."11/

Judge Kennedy's dual emphasis on structural limits and judicial restraint affects his view of unenumerated rights. In a 1986 speech on this subject, Kennedy stated:

> In discussions of unenumerated rights, there seems to be an undercurrent that judicial power to declare them is a necessary antidote to the potential excesses of a democratic majority. That formulation tends to distract us from the fact that there are other protections in the American system ....
>
> At the outset, the Framers conceived the Constitution primarily as a system for the structural allocation of powers. ... [T]he Bill of Rights, including the Ninth Amendment, and the amendments after the Civil War, spacious as are some of their phrases, were not intended to relieve the political branches from their responsibility to determine the attributes of a just society.12/

Judicial articulation of unenumerated rights could, in his view, cause

> the political branches of the government [to] misperceive their own constitutional role, or neglect to exercise it. If the judiciary by its own initiative or by silent complicity with the political branches announces unenumerated rights without ade-

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11/ A. Kennedy, Unpublished Speech, "Unenumerated Rights and the Dictates of Judicial Restraint," Canadian Institute for Advanced Legal Studies, The Stanford Lectures, Palo Alto, CA (July 24 - Aug. 1, 1986), at 22 [hereinafter, Unenumerated Rights Speech].

12/ Id. at 2-3. In this speech, Kennedy discusses three unenumerated rights: the right of travel, the right of privacy, and the right to vote. His comments on privacy focus primarily on the Supreme Court's decision in Bowers v. Hardwick, 106 S.Ct. 2841 (1986). He did note that "the results in Pierce and Meyer, if not their broad statements, are sustainable under the First Amendment." Unenumerated Rights Speech at 16.

> quate authority, the political branches may deem themselves excused from addressing constitutional imperatives in the course of the legislative process.[13]

Kennedy's emphasis on judicial restraint does not, however, preclude the overruling of precedent. Noting that "stare decisis is not an automatic mechanism," Kennedy outlined at the hearings the factors that he would consider in deciding whether to overrule a particular case:

> What does the most recent decision ... say? What is its logic? What is its reasoning? What has been its acceptance by the lower courts? Has the rule proven to be workable? Does the rule fit with what the judge deems to be the purpose of the Constitution as we have understood it over the last 200 years? And history is tremendously important in this regard.[14]

Judge Kennedy's structural approach leads him to trust federalism to protect individual liberty.[15] In October 1987, Kennedy observed:

---

[13] Id. at 21.

[14] Hearing Testimony, Dec. 14, 1987, at 211.

[15] Several of the nominee's most recent speeches — delivered in October 1987 -- set forth his views on federalism. Judge Kennedy considers federalism one of the four structural elements of the Constitution, along with separation of powers, checks and balances, and judicial review. Our system of dual state and federal sovereignty, Kennedy maintains, was "the unique and most daring contribution made by the framers to the science of government." Sacramento Rotary Club Speech, supra, at 7. He warns, however, that "of all the structural elements in the Constitution, federalism is the only one that has undergone the transformation, [and] the only one whose future is problematic and endangered." A. Kennedy, Unpublished Speech, "Federalism: The Theory and the Reality," Historical Society for the United States District Court for the Northern District of California, San Francisco, CA (Oct. 26, 1987), at 1 [hereinafter, Historical Society Speech].

> The states, and their subdivisions, with more visible and approachable legislators, and often with an initiative and referendum process, are likely to be more responsive to the citizens than the federal government.16/

He underscores the importance of protecting state sovereignty against federal encroachment:17/

> [T]he principal protection for the states is that the national government is one of limited powers. ... The principal structural mechanism to enforce the rule that the national government is one of limited authority is judicial review. Federalism concerns underlie most constitutional cases. Suppose, for instance, the issue is whether or not a Miranda warning must be given to a criminal. At bottom lies the issue whether or not the federal courts, as an arm of the federal government, can impose an obligation on the states.18/

Implicit in this view is a possible diminution of the Supreme Court's special role as protector of individual liberty.

16/ Id. at 13.

17/ Id. at 9; see also Hearing Testimony, Dec. 15, 1987, at 129-30; Dec. 14, 1987, at 109-10. Kennedy testified, for example, that "there are no automatic mechanisms, or very few, in the Constitution, to respect the rights of states. ... Which indicates, I think, that we have a special obligation to ascertain the effects of national policy on the existence of state sovereignty." Hearing Testimony, Dec. 15, 1987, at 129-30; see also Dec. 14, 1987, at 109-10.

18/ Historical Society Speech, supra, at 9.

CIVIL LIBERTIES RECORD

What follows is a subject-by-subject analysis of decisions authored by Judge Kennedy during his tenure on the Ninth Circuit. Where relevant, we have also incorporated portions of his unpublished speeches and hearing testimony.

PRIVACY

At the hearings, Judge Kennedy stated that he has no "fixed view" on "privacy, or abortion."1/ This view is consistent with his more general belief that constitutional principles need time to evolve.2/ The emphasis on judicial restraint found in many of his speeches, however, suggests that Judge Kennedy is likely to be cautious in his articulation of unenumerated rights such as privacy:

> The judicial method ... is to decide specific cases, from which general propositions later

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1/ Hearing Testimony, Dec. 14, 1987, at 103-4.

In Beller v. Middendorf, 632 F.2d 788 (1980), cert. denied, 452 U.S. 905 (1981), Kennedy side-stepped the question whether Navy regulations mandating discharge of anyone engaged in homosexual activities infringed on a protected right of privacy. Kennedy's opinion concedes "arguendo" that "some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge." Id. at 810. Judge Norris, in his dissent from the court's rejection of the suggestion for rehearing en banc, criticizes the opinion for failing to resolve the privacy issue. See Miller v. Rumsfeld, 647 F.2d 80 (1981).

In Aujero v. CDA Todco, Inc., 756 F.2d 1374 (1985), Kennedy affirmed dismissal of a claim that imposition of a mandatory meal payment on elderly residents of a federally-funded housing project violated a substantive right of privacy.

2/ A. Kennedy, Unpublished Speech, Sacramento Chapter of the Rotary Club, Sacramento, CA (Feb. 1984), at 6 [hereinafter Rotary Club Speech].

> evolve, and this approach is the surest safeguard of liberty. It forts constitutional dynamics, and it defies the presidential [sic] method to announce in a categorical way that there can be no unenumerated rights, but I submit it is imprudent as well to say that there are broadly defined categories of unenumerated rights, and to say so apart from the factual premises of decided cases. This follows from the dictates of judicial restraint.3/

According to Kennedy, judicial restraint does not permit extensive use of the Ninth Amendment or other constitutional provisions to protect individual rights not mentioned in the Constitution; he maintains that creation of such rights is primarily the responsibility of the legislature.4/ Similarly, he stated with respect to the Due Process Clause: "One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the

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3/ Unenumerated Rights Speech, supra, at 4-5. Kennedy made a similar point in a 1984 speech:

> To recognize the necessity of continued interpretation does not give us a license to interpret the document for utilitarian ends. The Constitution cannot be thrown about as a panacea for every social ill. ... The Constitution cannot be divorced from its logic and its language, the intention of its framers, the precedents of the law, and the shared traditions and historic values of our people.

A. Kennedy, Unpublished Speech, Sacramento Chapter of the Rotary Club, Sacramento, CA (Feb. 1984), at 7 [hereinafter, Rotary Club Speech].

4/ See generally Unenumerated Rights Speech, supra, at 2-3. Judge Kennedy's speeches show some solicitude for unenumerated rights where they can be found to "rest[] on a value of federalism and not a more fundamental conception of right and wrong ...." Id. at 6. But see Fisher v. Reiser, 610 F.2d 629 (1979).

written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system."[5/]

At the hearings, Kennedy reaffirmed this distinction between rights essential to a just society and unenumerated rights that judges can enforce.[6/] He never stated that the Constitution protects a general right to privacy. Rather than recognizing a right to privacy, Kennedy would allow only that the guarantee of liberty in the Due Process Clause protects certain values, including a "value" of privacy:[7/]

> SENATOR HUMPHREY: Are you saying that these privacy cases would be better dealth with under the Liberty Clause?
>
> JUDGE KENNEDY: That is why I have indicated that I think liberty does protect the value of privacy in some instances.
>
> SENATOR HUMPHREY: You would prefer then to deal with the privacy cases under the Liberty Clause?
>
> JUDGE KENNEDY: Yes.
>
> SENATOR HUMPHREY: As opposed to dealing with them under the emanations of penumbrae?
>
> JUDGE KENNEDY: Yes, sir.[8/]

5/ Unenumerated Rights Speech, supra, at 13.

6/ See, e.g., Hearing Testimony, Dec. 15, 1987, at 20, 47-48, 63-64.

7/ See, e.g., Hearing Testimony, Dec. 14, 1987, at 98, 176-177; Dec. 15, 1987, at 135-136, 208-209.

8/ Hearing Testimony, Dec. 15, 1987, at 209-10. Kennedy testified that he would consider the following factors to determine which activities are protected by the Constitution:

> A very abbreviated list of the considerations are the essentiality of the right to human dignity, the

(continued...)

When asked if Griswold v. Connecticut[9/] -- which recognized a married couple's right to purchase contraceptives -- was properly decided, Kennedy would not commit himself to the correctness of either "its reasoning or its result."[10/] When pressed on this point, Judge Kennedy did agree that the Constitution protects a marital right to privacy.[11/]

Kennedy continued to express doubt as to whether the Ninth Amendment could be used as a source of unenumerated rights:

> [T]he Ninth Amendment was in [a] sense a recognition of state sovereignty and a recognition of state independence and a recognition of the role of the states in defining human rights. That is why it is something of an irony to say that the Ninth

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8/ (...continued)
injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person not to obtain his or her own self-fulfillment, the inability of a person not to reach his or her own potential.

On the other hand, the rights of the state are very strong indeed. There is the deference that the court owes to the democratic process, the deference that the court owes to the legislative process, the respect that must be given to the role of the legislature, which itself is an interpreter of the Constitution, the respect that must be given to the legislature because it knows the values of the people.

Id. at 80-81. See also id. at 57. Kennedy denied that these were subjective judgments, adding that "The task of the judge is to try to find objective reference ... for each of those categories." Id. at 81.

9/ 381 U.S. 479 (1965).

10/ Hearing Testimony, Dec. 15, 1987, at 42.

11/ Id. at 43.

> Amendment can actually be used by a Federal Court to tell the state that it cannot do something. But the incorporation doctrine may lead to that conclusion, and that is the tension.[12/]

Judge Kennedy suggested that the Supreme Court has treated the Ninth Amendment as "something of a reserve clause, to be held in the event that the phrase 'liberty' and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision."[13/] He declined, however, to endorse this approach. To the contrary, Judge Kennedy stated:

> [I]t is the ultimate irony that an amendment that was designed to assuage the States is being used by a federal entity to tell the States that they cannot commit certain acts.[14/]

DISCRIMINATION AND ITS REMEDIES

Judge Kennedy's civil rights record is sparse but troubling. He seems to believe that discrimination, even based on race, is permissible if the discriminators have no intent to stigmatize. His narrow definition of invidious discrimination does not comport with Supreme Court precedent. Nor does it reflect sensitivity to the pervasive and subtle forms of modern-day discrimination. Kennedy's requirement of proof of intent has led him to reject claims of discrimination in several important

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12/ Hearing Testimony, Dec. 15, 1987, at 79.

13/ Hearing Testimony, Dec. 14, 1987, at 97.

14/ Hearing Testimony, Dec. 15, 1987, at 220.

cases. Finally, Judge Kennedy's membership in restrictive clubs raises serious questions as to his basic commitment to equal justice under law.

Club Membership

The ABA Code of Judicial Conduct states that "[i]t is inappropriate for a judge to hold membership in any organization that practices invidiously discriminates on the basis of race, sex, or religion." During the 1970's and 1980's, Judge Kennedy belonged to several clubs that limit membership based on race and gender. He did not resign his membership in the restrictive Olympic Club until October 27, 1987.[15/] In defense of his club membership, Kennedy put forth a troubling construction of "invidious discrimination." He noted:

> "Invidious discrimination" suggests that the exclusion of particular individuals on the basis of their sex, race, religion or national origin is intended to impose a stigma on such persons. As far as I am aware, none of these policies or practices were the result of ill-will. I recognize nonetheless that real harm can result from membership exclusion regardless of its purported justification.[16/]

At the hearings, Judge Kennedy made clear that he believes discrimination to be invidious only when the discriminators have an intent to stigmatize. Although Judge Kennedy acknowledged that "the injury and the hurt and the personal hurt can be there,

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15/ See Response to Question 3, Part III, Senate Judiciary Committee Initial Questionnaire (concerning restrictive membership policies of clubs to which the nominee has belonged).

16/ Id. at 50 (emphasis added).

regardless of the motive,"[17] he never conceded that the discriminatory policies of the all-male clubs to which he belonged were in fact invidious. Moreover, when asked generally whether race-based classifications could ever be justified, the nominee limited his response only to invidious discrimination.[18] He does not seem to recognize that the fact of exclusion imposes a stigma that is itself a subject of legitimate concern regardless of any "ill-will" toward an excluded group.

Race and Natural Origin

Judge Kennedy's concern for state's rights rather than civil rights may be seen in Spangler v. Pasadena City Bd. of Education, 611 F.2d 1239 (1979). There, after a remand from the Supreme Court, the court of appeals reversed a district court's denial of the school board's motion to relinquish jurisdiction. The court relied on the board's present compliance with integration efforts and its official representations that it would continue to engage in action in support of integration. Judge Kennedy concurred, writing separately "to give emphasis to certain aspects of this case." Id. at 1242. He stated:

> [W]hen a court ordered remedy has accomplished its purpose, jurisdiction should terminate. The relinquishment of jurisdiction in a proper case serves to restore to the state and local agencies the legal responsibility for supervising a school system that is properly theirs, and this too is

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17/ Hearing Testimony, Dec. 14, 1987, at 141.

18/ Id. at 168.

> a necessary consideration in fixing the duration of the court's remedial supervision.

Ibid.

According to Kennedy, "compliance with the 'Pasadena Plan' for nine years is sufficient in this case, given the nature and degree of the initial violation, to cure the effects of previous improper assignment policies." Id. at 1244. He stated:

> The Supreme Court has emphasized that when a large percentage of minority students in a neighborhood school results from housing patterns for which school authorities are not responsible, the school board may not be charged with unconstitutional discrimination if a racially neutral assignment method is adopted.

Ibid. In fact, Supreme Court precedent establishes that a federal remedy may be appropriate if the residential segregation results from governmental action, even if not the action of the school authorities. See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 32 (1971). Moreover, Judge Kennedy refused to accept the district court's finding that, by announcing its intention to return to the pre-1970 neighborhood school pattern, the Board acted with the same segregative intent as it had in 1970. Judge Kennedy instead assumed, without factual basis, that "[a] policy favoring neighborhood schools in not synonymous with an intent to violate the constitution." 611 F.2d at 1245.

Judge Kennedy's willingness to return power to local authority, despite evidence of resegregation, is consistent with the notion of federalism expressed in his unpublished speeches.

Both reflect the nominee's deference to state and local sovereignty and his distrust of federal encroachment on local control, particularly when assisted by the courts.

Judge Kennedy displayed greater receptivity to a claim of discrimination, however, in Flores v. Pierce, 617 F.2d 1386 (1980), cert. denied sub nom. Autry v. Flores, 449 U.S. 875 (1980), where there was a strong showing of invidious intent. Two Mexican-Americans sued local officials under §1983, claiming that issuance of a liquor license had been delayed due to plaintiffs' race or national origin. A jury found that the officials violated the Constitution and awarded damages. The court of appeals, per Kennedy, affirmed. He found the "disparate effect" of the defendants' action so compelling that it "may approach, if it does not reach, the demonstration of an intent to discriminate that was made in Yick Wo v. Hopkins." Id. at 1389. He also found ample evidence of intent to discriminate:

> It was shown that the defendant city officials deviated from previous procedural patterns, that they adopted an ad hoc method of decision making without reference to fixed standards, that their decision was based in part on reports that referred to explicit racial characteristics, and that they used stereotypic references to individuals from which the trier of fact could infer an intent to disguise a racial animus.

Ibid. In Kennedy's view, the subsequent approval of plaintiffs' license by state authorities did not eliminate the constitutional injury:

> If the rigors of the governmental or administrative process are imposed upon certain persons with an intent to burden, hinder, or

> punish them by reason of their race or national origin, then this imposition constitutes a denial of equal protection, notwithstanding the right of the affected persons to secure the benefits they seek by pursuing further legal procedures.

Id. at 1391.

Gender

In AFSCME v. State of Washington, 770 F.2d 1401 (1985), Judge Kennedy reversed a lower court's finding that the State discriminated on the basis of sex in violation of Title VII. Beginning in 1974, the State of Washington undertook job evaluation studies to determine whether wage disparities existed among predominantly male and female job categories. For jobs of comparable worth, the studies found approximately a 20 percent disparity, to the disadvantage of employees in jobs held mostly by women. The State enacted legislation which would implement a compensation scheme based on comparable worth over a ten-year period. In this suit, AFSCME sought immediate implementation of a comparable worth system of compensation and back pay for workers who had been subject to discrimination.

Judge Kennedy found "nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand ...." Id. at 1407. In addition, he noted:

> The instant case does not involve an employment practice that yields to disparate impact analysis. ... A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by Dothard and Griggs; such a compen-

> sation system, the result of a complex of market forces, does not constitute a single practice that suffices to support a claim under a disparate impact theory.

Id. at 1406. Thus, in Kennedy's view, "job evaluation studies and comparable worth statistics alone are insufficient to establish the requisite inference of discriminatory motive critical to the disparate treatment theory."[19/] Id. at 1407.

The trial judge, however, had made no direct finding that the State's compensation scheme reflected "market forces." To the contrary, the trial judge found "no credible evidence ... that would support a finding that the State's practices and procedures were based on any factor other than sex." 578 F. Supp. 846, 866 (W.D. WA. 1984) (emphasis added). The record contains considerable evidence that the State did not follow the "market" in setting wages. Nor does Kennedy recognize that the market reflects patterns of discrimination and that reliance on the market is therefore not a conclusive response to claims of discrimination. In any event, if Judge Kennedy believed that the district court had not given sufficient weight to a "market defense," the proper course would have been to remand; instead,

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19/ In addition, he found plaintiffs' independent evidence of discrimination "insufficient to support an inference of the requisite discriminatory motive." 770 F.2d at 1407. Judge Kennedy did not explain why the district court's factual conclusion to the contrary was clearly erroneous, as required under Pullman-Standard v. Swint, 456 U.S. 273, 287-89 (1982), and Anderson v. Bessemer City, 470 U.S. 564 (1985). Indeed, under the formulation of Teamsters v. United States, 431 U.S. 324 (1977), plaintiffs clearly introduced sufficient evidence for a factual finding of intentional classwide disparate treatment, i.e., statistical evidence plus individual instances of facially discriminatory actions. Judge Kennedy, however, overturned that finding.

Judge Kennedy ignored the record evidence and simply assumed the factual basis of a market defense.[20/]

Even more troubling is Judge Kennedy's refusal to apply disparate impact analysis to the facts of the case. To be sure, certain courts have limited disparate impact analysis only to cases that challenge a specific employment criteria, such as a written test or height and weight requirement.[21/] But since Griggs it has been clear that an employment test that works a disparate impact on women or minorities suffices to support a claim under disparate impact theory.[22/] Judge Kennedy, by contrast, gave disparate impact theory the most restrictive interpretation possible, holding it can be applied only to "a specific, clearly delineated employment practice applied at a single point in the job selection process." 770 F.2d at 1406.[23/]

20/ The Supreme Court has struck down under the Equal Pay Act wage differentials which simply "reflected a job market in which [the employer] could pay women less than men for the same work." Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974). "That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work." Ibid.

21/ One aspect of this issue is currently pending before the Supreme Court. See Watson v. Fort Worth Bank & Trust Co., No. 86-6139, cert. granted, 55 U.S.L.W. 3876 (1987). Watson concerns whether subjective selection devices can be challenged through the use of disparate impact analysis.

22/ See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

23/ He relied primarily upon a Ninth Circuit panel opinion, Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (1985), which was subsequently reversed en banc, 810 F.2d 1477 (1987).

See also Fadhl v. City and County of San Francisco, 741 F.2d 1163 (1984). In Fadhl, Kennedy reversed a district court decision in favor of a Title VII plaintiff, a female police trainee, who was terminated for "un-

(continued...)

In his testimony before the Senate Judiciary Committee, Kennedy defended the decision in AFSCME. He continued to criticize the imposition of liability for what he viewed solely as a failure to depart from the market:

> The State of Washington was subject to a judgment of $800 million ... on the theory that their failing to depart from the market system and from the market forces was an actionable violation.
>
> ....
>
> We did not think, however, that there was a shred of evidence to show that the state had deliberately maintained that pay scale dif-

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23/ (...continued)
acceptable performance." Id. at 1165. The district held the city liable, based on its finding that discrimination affected the evaluative process. However, Kennedy concluded that the district court incorrectly found the plaintiff was not present at her termination hearing, and, despite the apparent lack of relevance between this finding and the imposition of liability, ordered a remand because "we do not know what weight the trial judge gave to this incorrect finding." Id. at 1166. Kennedy also remanded for further findings on the issue of damages. Id. at 1167. See also White v. Washington Public Power Supply System, 692 F.2d 1286 (1982) (reversing finding of discrimination of the basis of race and sex because the district court improperly shifted the burden of proof on the defendant).

In Gerdom v. Continental Airlines, 692 F.2d 602 (1982) (en banc), cert. dismissed, 460 U.S. 1074 (1983), Judge Kennedy joined the dissent, which took a narrow view of disparate impact and discriminatory treatment analysis under Title VII. At issue in Gerdom was a policy that required employees who were "flight hostesses" to comply with strict weight requirements as a condition of their employment, while not imposing similar restrictions on male "directors of passenger service." The majority held that the policy constituted discriminatory treatment on the basis of sex under Title VII, and thus did not address whether the policy could also be attacked under disparate impact analysis. While acknowledging that Gerdom established a prima facie case of disparate treatment, the dissent nonetheless concluded that the case should be remanded for further evidence, stating that the majority erred in "making a factual comparison between flight hostesses and directors of passenger service ... on a motion for summary judgment." Id. at 614. The dissent also held that the policy could not be challenged under disparate impact analysis. Id. at 611-12.

> ference in order to discriminate against women.[24/]

Notwithstanding Judge Kennedy's lack of receptivity to statutory claims of gender discrimination, he suggested at the hearings that he might be willing to consider raising the standard of review for constitutional claims. Noting that the judicial system has not had "the historical experience with gender discrimination cases that we have had with racial discrimination," Kennedy stated:

> [T]he law there really seems to me in a state of evolution at this point, and it is going to take more cases for us to ascertain whether or not the heightened scrutiny standard is sufficient to protect the rights of women, or whether or not the strict standard should be adopted.[25/]

As an appellate judge, however, Judge Kennedy has not applied heightened scrutiny to Constitutional claims of gender discrimination. In United States v. Smith, 574 F.2d 988 (1978), cert. denied, 439 U.S. 852 (1978), male federal prisoners challenged their conviction for forcible sodomy upon another male prisoner under the Federal Assimilative Crimes Act. By incorporating a state law definition of rape, the Act imposed a higher sentence than federal law, which applied only to male rape of a female. Judge Kennedy rejected the claim "that the difference in the penalties for these offenses constitutes

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24/ Hearing Testimony, Dec. 15, 1987, at 31-32. See also id. at 194-195.

25/ Hearing Testimony, Dec. 14, 1987, at 170.

unlawful discrimination on the basis of sex" applying a rational relation test.26/ Id. at 991.

Sexual Orientation

Judge Kennedy has consistently refused to protect gay and lesbian litigants against discrimination. He consistently applies a rational basis standard. We do not know whether this approach will carry over to other unpopular minorities not now protected by heightened scrutiny.

Beller v. Middendorf, 632 F.2d 788 (1980), cert. denied, 452 U.S. 905 (1981), upheld the constitutionality of a Navy regulation mandating discharge of anyone engaged in homosexual activities. Judge Kennedy, writing for the court, noted that substantive due process, rather than equal protection, was the

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26/ Judge Kennedy's justification for the sentencing differential shows a lack of sensitivity to the act of male rape of a female, as well as a clear repugnance for acts which, about coercion, are associated with male homosexuality:

> The physical abuses against the victim's anatomy committed in this case were acts distinct in kind from the act of rape as proscribed by federal statute and defined by common law. It is rational to determine that the harm, both physical and mental, suffered by victims of these two crimes are of a different quality in each instance. These distinctions are reflected in traditions and community attitudes that have prevailed for centuries, and penal laws may properly take account of such differences by assigning a separate generic classification to each offense. ... The equal protection clause is not offended when Congress punishes one offense by assimilation of a state statute but provides its own definition and punishment for a rationally distinguishable offense.

574 F.2d at 991.

basis for the plaintiffs' constitutional claim. He explained that "[r]ecent decisions indicated that substantive due process scrutiny of a government regulation involves a case-by-case balancing" of the competing interests, rather than the "formal three-tier analysis" applied to equal protection claims. Id. at 807.[27/] Citing substantial authority on both sides of the question, the opinion conceded "arguendo" that "some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge." Id. at 810. Judge Kennedy then uncritically accepted the government's asserted interest in military discipline, finding that it outweighs "whatever heightened solicitude is appropriate for private homosexual conduct." Ibid.

27/ Kennedy noted, however, "important analytical and rhetorical similarities" between the two approaches:

> [W]hen conduct either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to governmental regulation, then analysis under the substantive due process clause proceeds in much the same way as under the lowest tier of equal protection scrutiny. ... At the other extreme, where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis. See, e.g., Roe v. Wade; Griswold v. Connecticut; Skinner v. Oklahoma ....
>
> The case before us lies somewhere between these two standards.

632 F.2d at 808-09 (citations omitted).

In a long footnote, Judge Kennedy criticized decisions in other courts requiring proof that a particular plaintiff, terminated on grounds of homosexuality, is unfit for employment. According to Kennedy, those courts "misunderstood the meaning of rationality in the Court's due process cases." Id. at 808, n.20. Judge Kennedy also suggested that dismissal would have been proper even under equal protection analysis. "Discharge of the particular plaintiff before us would be rational, under minimal scrutiny," Judge Kennedy stated, "not because their particular cases present the dangers which justify Navy policy, but instead because the general policy of discharging all homosexuals is rational." Ibid.

Judge Norris dissented from the court's rejection of the suggestion for rehearing en banc. Miller v. Rumsfeld, 647 F.2d 80 (1981). In his view, the Beller panel "seriously misconstrued the proper methodology of substantive due process analysis," by rejecting the fundamental rights approach adopted in Griswold v. Connecticut in favor of a "balancing" approach. Id. at 80-81. Contrary to Kennedy's reliance on "recent decisions," the dissent argues that

> it is not in any sense accurate to suggest that the recent decisions of the Supreme Court compel or even allow this. The problem with the panel's balancing approach--the reason, I suggest, that the Supreme Court has refrained from adopting it--is that it is inherently standardless.

Id. at 82. The dissent also took issue with the panel's uncritical acceptance of the government's military necessity

justification, noting that, "[c]onsidered with proper detachment rather than knee-jerk acquiescence, the military necessity argument is revealed not to be supported by the record in Beller." Id. at 87.

Judge Kennedy also wrote the majority decision in Sullivan v. INS, 772 F.2d 609 (1985), which involved deportation of a homosexual alien despite claims that extreme hardship would result if separated from his life partner of 12 years. Respondent further claimed that as a highly publicized gay leader, he faced extreme hardship in his country of origin, known to be hostile to homosexuals. Judge Kennedy, over a strong dissent, held that the Board of Immigration Appeals did not abuse its discretion in construing narrowly the extreme hardship provision. "Deportation rarely occurs," Judge Kennedy wrote, "without personal distress and emotional hurt."28/ Id. at 611.

Handicap

Nor does Judge Kennedy's record display vigorous enforcement of legislation designed to assist historically disadvantaged groups such as the handicapped. In Mountain View-Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28 (1983), Kennedy adopted a narrow construction of the Education for All

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28/ Judge Kennedy's casual treatment of the bond between homosexual life partners, see 772 F.2d at 612, stands in marked contrast to his solicitude for the traditional family, see United States v. Penn, supra, 647 F.2d 876, 888-9 (Kennedy, J., dissenting), cert. denied, 449 U.S. 903 (1980).

Handicapped Children Act (EAHCA). Relying on the pendency of the Act's administrative procedures, Kennedy held that parents could not unilaterally decide to transfer their handicapped child to a private school and then seek reimbursement from the school district. He stated:

> The statute does confer on district courts the power to give all "appropriate relief" ..., but absent legislative history suggesting the contrary, such a phrase is usually construed as a mere grant of jurisdiction to enforce and supplement the administrative procedures for identification, evaluation, and placement of the child, and not of authority to award retrospective damages.

Id. at 30 (citations omitted).

Two years later, in Burlington School Comm. v. Massachusetts Dept. of Education, 471 U.S. 359 (1985), the Supreme Court squarely rejected this construction of EAHCA. In a unanimous opinion by Justice Rehnquist, the Court held that "by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." Id. at 370. The Court rejected the characterization of reimbursement as damages, noting that "reimbursement merely requires the [school district] to belatedly pay expenses that it should have paid all along." Id. at 370-371.

At the hearings, Judge Kennedy invoked federalism in defense of his decision: "[W]e were being asked in this case to say that a local school district, an entity of the state, was required to

pay this sum. We thought a question of Federalism was involved, in that school districts are strapped for every penny."29/

Economic Regulation

Judge Kennedy has likewise rejected equal protection challenges to economic classifications, even where fundamental rights are alleged to be at stake. In Fisher v. Reiser, 610 F.2d 629 (1979), the Court of Appeals, per Kennedy, upheld Nevada's worker's compensation statute which denied cost-of-living increases to out-of-state beneficiaries. Faced with an alleged burden on the right-to-travel, Judge Kennedy upheld the classification, refusing to apply strict scrutiny on behalf of "one who has migrated from the state which denies the benefit in question." Id. at 633.

Tsosie v. Califano, 630 F.2d 1328 (1980), rejected an equal protection challenge to the denial of child's insurance benefits under the Social Security Act to a child adopted after the death of the eligible wage earner. Judge Kennedy found nothing irrational in the statute's test of dependency, which excluded from coverage an after-adopted child who had actual dependency upon the wage earner.

VOTING RIGHTS

Judge Kennedy's voting rights record is mixed. Where an electoral scheme has not implicated race or ethnicity, he has vigorously enforced the principle of one-person, one-vote. By

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29/ Hearing Testimony, Dec. 14, 1987, at 133.

contrast, his record shows a insensitivity to the role of race and ethnicity in electoral politics and a misunderstanding of the concept of vote dilution.

Judge Kennedy's most troubling opinion in this area is Aranda v. Van Sickle, 600 F.2d 1267 (1979), cert. denied, 446 U.S. 951 (1980), which involved a constitutional challenge on behalf of Mexican-Americans to an at-large election scheme in the City of San Fernando. Judge Kennedy, "[a]fter some hesitation," id. at 1275, concurred in the majority's affirmance of summary judgment against the plaintiffs.30/

The evidence of discrimination in Aranda was strong, and certainly sufficient to require a trial on the merits. The City of San Fernando had used an at-large election scheme since its incorporation in 1911. By the early 1970's, the population had become half Mexican-American, yet only three Mexican-Americans had ever been elected to the City's five-member City Council. Mexican-Americans were a distinct, geographically insular community; most of the polling places were located in white homes; few Mexican-Americans were employed as election officials and few had been appointed to city boards and commissions; political campaigns were characterized by racial appeals; all ballots and election materials were available only in English; and the City had a history of discrimination against Mexican-Americans.

30/ Vote dilution cases are almost never disposed of on summary judgment; when they are, they have been regularly reversed on appeal. See, e.g., Monroe v. City of Woodville, Mississippi, 819 F.2d 507 (5th Cir. 1987).

The Supreme Court in White v. Regester, 412 U.S. 755 (1973), had relied on effect-type evidence, without proof of intent, to invalidate at-large elections for state legislators. Nevertheless, Judge Kennedy required plaintiffs to prove "that the at-large system for electing the mayor and city council members is maintained because of an invidious intent." 600 F.2d at 1277.31/

At the hearings, Kennedy was questioned extensively about Aranda. Despite the substantial evidence of discrimination, he maintained that the result in that case was dictated by the intrusive nature of the remedy sought by the plaintiffs -- a district election scheme. Kennedy stated:

> This is one of the most powerful, one of the sweeping, one of the most far-reaching kinds of remedies that the Federal Court can impose on a local system. And in our view, or in my view, as is expressed in the concurrence, that remedy far exceeded the specific wrongs that had been alleged.32/

In contrast to Aranda, Judge Kennedy actively protected the principle of one-person, one-vote in James v. Ball, 613 F.2d 180 (1979), rev'd, 451 U.S. 355 (1981), which involved the constitutionality of an Arizona statute providing that voting in elections for directors of a water storage and delivery and power district could be limited to landowners, with votes apportioned

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31/ In 1982, Congress amended § 2 of the Voting Rights Act to make clear that electoral practices that have a discriminatory effect are illegal.

32/ Hearing Testimony, Dec. 15, 1987, at 23-24. See also id. at 112-116; 222-226.

according to acreage owned within the district. Judge Kennedy, for a divided court, struck down the statute, relying on the fact that the district did not have "a special limited purpose" and its activities did "not disproportionately affect landowners." Id. at 184. The Supreme Court reversed, with Justices White, Brennan, Marshall and Blackmun dissenting.

McMichael v. County of Napa, 709 F.2d 1268 (1983), involved a challenge to a countywide referendum adopting a slow-growth ordinance applying only to the unincorporated area of Napa County, California. Residents of unaffected incorporated areas were allowed to vote in the referendum. Plaintiff, a resident of the unincorporated area, contended that his vote was thereby unconstitutionally diluted. The majority affirmed dismissal on standing grounds. Judge Kennedy concurred, but would have dismissed the complaint for failure to state a claim. He stated:

> Federal courts will enter orders to invalidate state election results where voters have suffered an unconstitutional deprivation of the opportunity to vote even when it is not clear that the outcome would have been affected, but such relief has been reserved for instances of willful or severe violations of established constitutional norms. The present case is not in that category.

Id. at 1273-74 (citations omitted).[33/]

33/ Judge Kennedy did not acknowledge that under certain circumstances, the voters of one jurisdiction might lack a sufficient legal interest in the affairs of another jurisdiction to justify their inclusion in an election. See, e.g., Locklear v. North Carolina State Board of Elections, 514 F.2d 1152 (4th Cir. 1975) (allowing city residents who had an independent school system to vote in county school board elections dilutes the voting strength county residents in violation of the equal protection clause).

RIGHTS OF ALIENS

Judge Kennedy record on the rights of aliens is also mixed and is not easy to characterize.34/

Kennedy has limited the procedural recourse available to aliens in immigration proceedings. For instance, in Reyes v. INS, 571 F.2d 505 (1978), Judge Kennedy determined that the Court of Appeals could not review a decision of the Board of Immigration Appeals ("BIA") to deny a stay of deportation until the BIA decided a pending motion to reopen the proceedings. Kennedy's decision yielded the anomalous result that Reyes was deported while his motion to reopen was pending, and was denied an opportunity to meaningfully appeal that deportation. This comported with Congress' intention, wrote Kennedy, to "correct abuses in the process of judicial review of deportation orders" and prevent "dilatory tactic[s]." Id. at 507.35/

Similarly, in Gutierrez v. INS, 745 F.2d 548 (1984), Judge Kennedy also narrowly circumscribed the procedural rights available to the alien. A prior Ninth Circuit decision held that when the basis upon which the INS seeks deportation is identical to a statutory ground for exclusion for which discretionary

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34/ In a February 1984 speech, Kennedy observed that the rights of aliens -- particularly claims for asylum -- raise "great difficulties in making our Constitution mesh neatly with extensive international commitments." Rotary Club Speech, supra, at 7-8.

35/ Two years later, in Sotelo Mondragon v. Ilchert, 653 F.2d 1254 (1980), the Ninth Circuit corrected this anomaly by establishing that an alien could challenge the BIA's decision to deny such a stay of deportation through a writ of habeas in the district court. This possibility was not discussed in Kennedy's earlier decision.

relief would be available, the equal protection clause requires that discretionary relief be accorded in the deportation context as well. In dicta, Kennedy implicitly rejected the alien's claim that the equal protection clause required the availability of discretionary relief for an alien deportable for entry without inspection because there "[is] no precise parallel among the explicit grounds for exclusion." Id. at 550.

Judge Kennedy has also been willing to impose high burdens of proof on aliens seeking to enter. Dissenting in Urbano de Maluluan v. INS, 577 F.2d 589 (1978), for example, he disputed the majority's view that inconvenience to two citizen children might constitute "hardship" supporting a motion to reopen deportation proceedings, and suggest that the majority was improperly swayed by the "sympathetic fact situation[]." Id. at 596. In Oi Lan Lee v. INS, 573 F.2d 592 (1978), Judge Kennedy upheld the BIA's decision to weigh inconclusive blood test evidence against the plaintiff's visa application on behalf of her alleged son, and to discount what Judge Kennedy termed "the appellant's self-serving affidavits of herself and her daughter" in support of the application.

Further, in Quintanilla-Ticas v. INS, 783 F.2d 955 (1986), Judge Kennedy rejected the petition of an alien and his family for political asylum, relying in part on his own views of the situation in El Salvador. Quintanilla-Ticas had been threatened in El Salvador because he wore a military uniform. Since he had resigned from the military, observed Kennedy, "persecution is

less likely." Id. at 957. Moreover, "[e]ven if petitioners would face some danger in their home town because of Quintanilla-Ticas' former military status, deportation to El Salvador does not require petitioners to return to the area of the country where they formerly lived." Id. at 957.

In one notable instance, however, Kennedy was especially solicitous of aliens' rights. In NLRB v. Apollo Tire Co., 604 F.2d 1180 (1979), Kennedy concurred in the majority opinion that employed aliens are covered by the National Labor Relations Act (("NLRA"), since "[i]f the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case." Id. at 1184.[36/]

SEPARATION OF POWERS

Judge Kennedy's best known decision involved the balance of powers among the three branches of government. Several of his speeches also discuss separation of powers, stressing the benefits of a flexible, case-by-case approach, especially where Executive power is at stake.

For example, in a 1980 speech on the constitutional aspects of the presidency, Kennedy observed:

> The constitutional system works best if there remain twilight zones of uncertainty and tension between the component parts of the government. The surest protection of

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36/ The Ninth Circuit was only the second court of appeals to consider this issue; the Supreme Court later adopted a view similar to that of Judge Kennedy in Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).

> constitutional rule lies not in definitive announcements of power boundaries but in a mutual respect and deference among all the component parts.[37/]

Kennedy criticized the Supreme Court's resolution of the Watergate tapes controversy on this ground. He noted that

> [b]y acting to expedite the hearing and decision, the Supreme Court pretermitted the debate over disclosure that was going on between the political branches, the executive, and the Congress. ... The integrity of the legislature and its authority to preserve its own place in the constitutional system might have been established more decisively if it had solved its own problem with the Executive, without the unasked for help from the courts.[38/]

Kennedy believes, however, that the Constitution supports expansive Executive power. He states that "[t]he draftsmen of the Constitution structured the presidency so that its powers and functions would be drawn as much by history and tradition as by specific written provisions."[39/] Thus, he has suggested that the Executive can exercise broad authority in matters involving foreign affairs and national security:

> [I]n the field of foreign affairs, the President, while he is not viewed as a monarch, does embody the national will in the way that he does not domestically. ... From this concept, great powers flow to the President in foreign affairs. This is

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37/ Salzburg Speech, supra, at 11.

38/ Id. at 12-13. In his testimony, Kennedy made the same point: "[T]he Constitution does not work if any one branch of the government insists on the exercise of its powers to the extreme." Hearing Testimony, Dec. 15, 1987, at 50; see also Dec. 14, 1987, at 215.

39/ Salzburg Speech, supra, at 2.

> established by custom, tradition, and judicial precedent.[40]

By contrast, Kennedy believes that "the institutional structure of the legislature is not particularly well suited to the nuances" of foreign policy.[41]

In Chadha v. INS, 634 F.2d 408 (1981), aff'd, 462 U.S. 919 (1983), Judge Kennedy relied primarily on separation of powers analysis to invalidate the legislative veto provision of the Immigration and Nationality Act, which allowed one house to disapprove suspension of an order of deportation.[42] According

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40/ Id. at 9. Kennedy added that "the President in the international sphere can commit us to a course of conduct that is all but irrevocable, despite the authority of Congress to issue corrective instructions in appropriate cases." Id. at 10.

41/ Id. at 13-14. Judge Kennedy made similar points in his testimony, although he moderated his criticism of Congress. For example, Kennedy stated:

> [Youngstown] tells us, or begins to discuss, the critical question, whether or not the President is simply the agent of Congress, bound to do its bidding in all instances, or whether or not there is a core of power that lies at the center of the presidential office that the Congress cannot take away.
>
> As I understand current doctrine, and the Youngstown case, there is that core of power. The extent to which it can be exercised in defiance of congressional will is a question of abiding concern, I know, to the Congress and to judges.

Hearing Testimony, Dec. 14, 1987, at 215.

42/ By contrast, Chief Justice Burger's opinion for the Supreme Court relied exclusively on the constitutional requirements of presentment and bicameralism. 462 U.S. 919. Judge Kennedy, in an unusual extrajudicial discussion of the opinion, contrasted his analysis with the "more sweeping approach" taken by the Supreme Court. A. Kennedy, Hoover Lecture, Stanford Law School, Palo Alto, CA (May 17, 1984), at 1 [hereinafter, Hoover Lecture]. He noted that

> [i]n our court we left open the possibility of

(continued...)

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to Judge Kennedy, separation of powers serves two purposes: to prevent "an unnecessary and therefore dangerous concentration of power in one branch," 634 F.2d at 422, and "to promote governmental efficiency." Id. at 424. A violation of separation of powers occurs when there is

> an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government.

Ibid.

Applying this analysis to the one-house veto provision, Kennedy concluded that it violated separation of powers. If viewed as a corrective device, Congress was performing "a role ordinarily a judicial or an internal administrative responsibility." Id. at 430. Because of the possibility of congressional disapproval, nearly all judicial interpretations of suspension of deportation proceedings "are rendered, in effect, impermissible advisory opinions." Ibid. Judge Kennedy termed this interference with the central function of the judiciary "both disruptive and unnecessary." Ibid. If the purpose of the

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42/ (...continued)
> further analysis or doctrinal elaboration by confining the opinion to the case before us. This was [an] implied acknowledgement that some forms of legislative veto might survive. I had mentioned the presentment clause, but struck it from the last draft as superfluous to our holding.

Ibid.

legislative veto is for Congress to share in the administration of the statute, "such involvement trespasses upon central functions of the Executive." Id. at 432.[43/]

In a speech delivered at Stanford Law School, Kennedy discussed the implications of the Supreme Court's categorical invalidation of the legislative veto:

> The ultimate question then is whether the Chadha decision will be the catalyst for some basic congressional changes. My view of this is not a sanguine one. I am not sure what it will take for Congress to confront its own lack of self-discipline, its own lack of party discipline, its own lack of a principled course of action besides the ethic of ensuring its reelection. Madison distrusted the Congress because it would aggrandize the other branches; but I think the more real concern is its competence within its own legitimate sphere.[44/]

This indictment of congressional competence may explain Kennedy's willingness to protect the judicial and executive branches from perceived legislative overreaching.

In Pacemaker Diagnostic Clinic of America v. Instromedix, 725 F.2d 537 (1984), cert. denied, 474 U.S. 847 (1985), Judge Kennedy also applied separation of powers analysis, but reached a different result. Writing for a majority of the court, he found that the Federal Magistrates Act, which allows magistrates to

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43/ Kennedy's opinion also rejects the argument that the legislative veto was a separate legislative procedure that operated only after the executive and judicial procedures were complete. He noted that "the power to 'make all laws' has important formal and procedural limitations," most notably, bicameralism. 634 F.2d at 433.

44/ Hoover Lecture, supra, at 8.

conduct civil trials with the consent of the parties, did not violate separation of powers. While acknowledging that magistrates are not protected from removal or diminution of salary, Judge Kennedy held that "as this aspect of the separation of powers doctrine embodied in Article III is personal to the parties, it may be waived." Id. at 542.45/

FIRST AMENDMENT

Judge Kennedy has written few First Amendment decisions during his twelve years on the federal bench. He has written only one opinion dealing with the religion clauses. He has written sparingly on associational questions. And he has written only a handful of opinions dealing with free speech issues. His views on the scope of the First Amendment and the limits of political advocacy are virtually unknown. Nor do we know his views on church-state relations.

At the hearings, Kennedy testified:

> The First Amendment ... applies not just to political speech, although that is clearly one of its purposes, and in that respect it ensures the dialogue that is necessary for the continuance of the democratic process. But it applies, really, to all ways in which we express ourselves as persons. It applies to dance and to art and to music, and these features of our freedom are to many people as important or more important than political

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45/ The dissent disagreed with the proposition that Article III jurisdiction can be determined by consent of the parties. 725 F.2d at 547. The dissent also noted that one of the dangers of the Magistrates Act, recognized by Congress, was that it would "induce economically disadvantaged litigants, unable to afford the delay and cost of waiting or adjudication by an Article III judge, to consent to trial before a magistrate," thereby creating a two-tiered system of justice. Id. at 554.

> discussions or searching for philosophical truth, and the First Amendment covers all of these forms.[46]

On balance, it seems fair to say that Judge Kennedy's record on the First Amendment is a positive one. His record is not entirely unblemished but, on the whole, it demonstrates a sensitivity to the value of free speech in a constitutional democracy.

Campaign Finance

Judge Kennedy's longest and most significant First Amendment opinion is California Medical Ass'n v. Federal Election Comm'n, 641 F.2d 619 (1980), aff'd, 453 U.S. 182 (1981). The issue was whether Congress could constitutionally place a $5,000 limit on a professional association's contribution to a political action committee. Judge Kennedy upheld the contribution limit in a strong endorsement of the Supreme Court's approach in Buckley v. Valeo.[47] Based on Buckley, he ruled that strict judicial scrutiny was unnecessary because the contribution limit imposed only a minimal burden on First Amendment rights. Rather, he

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[46] Hearing Testimony, Dec. 14, 1987, at 152-153. But see Singer v. U.S. Civil Service Commission, 530 F.2d 247 (1976), vacated and remanded, 429 U.S. 1034 (1977), in which Judge Kennedy joined a unanimous decision that narrowly construes the scope of protected First Amendment activity. Singer was fired from his job as a clerk typist with the EEOC. The Ninth Circuit upheld the firing on the ground that Singer "openly and notoriously flaunt[ed] his homosexual way of life." The "notorious" activities included Singer's attempt to marry his lover, as well as a leadership role, including public speaking, on behalf of the Seattle Gay Alliance. The decision's holding that "open ... advocacy of homosexual conduct" is not protected speech raises serious questions as to whether Judge Kennedy will apply the First Amendment to unpopular or dissident views; no specific language, however, can be ascribed to Judge Kennedy.

[47] 424 U.S. 1 (1976) (per curiam).

held, the relevant question was whether the contribution limit promoted "a discernible, important and legitimate policy of the Congress." Id. at 628. Judge Kennedy found such a policy "inherent in the structure" of the federal campaign finance laws, id. at 629, and therefore rejected plaintiffs' First Amendment challenge. The ACLU took the opposite position in an amicus brief.

Employee Speech

Judge Kennedy's approach to employee free speech rights also raises a civil liberties concern. In Kotwica v. City of Tucson, 801 F.2d 1182 (1986), he ruled that a municipal employee could be sanctioned by her employer for deliberately misstating official policy to the press. The holding itself is not remarkable. Judge Kennedy's statement of the law, however, is sweeping in its implications. "The government's interest," he wrote, "is in direct proportion to the potential for interference with its ability to function, and in judging the level of interference, the government had broad discretion." Id. at 1184.

Lynn v. Sheet Metal Workers' Intern. Ass'n, 804 F.2d 1472 (1986), involved similar issues in a somewhat different context. The plaintiff in Lynn was dismissed from his position as union business manager after he publicly disagreed with the union leadership on the need for a dues increase. He then sued the union, claiming that his dismissal violated the labor bill of rights contained in the Landrum-Griffin Act. The majority agreed. Judge Kennedy argued in dissent that federal law pro-

tected only plaintiff's right to union membership, not his right to union office.

> [T]he majority errs in holding that union leadership cannot discharge a business manager who actively opposes the leadership on a fundamental issue of union policy.
>
> * * *
>
> Although this action indirectly penalizes [plaintiff] for his exercise of protected rights, it does so only in his capacity as an officer, not as a member. Absent a serious threat to the continued democratic governance of the union, such a dismissal does not violate the rights of union membership protected by [federal law]....

Id. at 1485.

Prior Restraints

By contrast, Judge Kennedy has scrupulously resisted prior restraints, whether sought by the government or private parties. For example, in Goldblum v. NBC, 584 F.2d 904 (1978), petitioner sought an injunction against an NBC "docu-drama" detailing abuses in the securities industry. Petitioner was at the time in jail for securities fraud. He contended that the film would prejudice his chances for early parole and inflame future juries against him in any possible civil actions. The district judge ordered the film produced so it could be reviewed for "inaccuracies." The network declined production, and the district court ordered the network's counsel imprisoned for contempt. In his opinion for the panel, Judge Kennedy reversed the district court, stating:

> The express and sole purpose of the district court's order to submit the film for viewing

> by the court was to determine whether or not to issue an injunction suspending its broadcast. Necessarily, any such injunction would be a sweeping prior restraint of speech and, therefore, presumptively unconstitutional.

Id. at 906.

Similarly, Judge Kennedy has rejected two requests for cease and desist orders sought by the Federal Trade Commission in commercial advertising cases. In Standard Oil Co. of California v. FTC, 577 F.2d 653 (1978), the FTC issued a cease and desist order that extended to any product promoted by Standard Oil or its advertising agency based on a finding that advertisements for gasoline additives had been false and misleading. Judge Kennedy struck down the order as overbroad:

> [F]irst Amendment considerations dictate that the Commission exercise restraint in formulating remedial orders which may amount to a prior restraint on protected commercial speech. ... At a minimum, administrative agencies may not pursue rigorous enforcement to the extent of discouraging advertising with no concomitant gain in assuring accuracy or truthfulness.

Id. at 662.

FTC v. Simeon Management Corp., 532 F.2d 708 (1976), addressed a related procedural issue. In support of its request for a preliminary injunction to restrain the advertising campaign of a diet clinic, the FTC argued that its determination that an injunction was necessary should be accepted by the court unless plainly unreasonable. Judge Kennedy disagreed:

> When potentially protected speech is subjected to prior restraint ... procedural safeguards are vitally important. Such

> safeguards would be inadequate if courts were required ... to enjoin advertising because the FTC claimed it was false, without first making an independent determination of the sufficiency of that claim.

Id. at 713. Judge Kennedy also noted that "forbidding the advertising altogether because public policy disfavors the underlying activity would raise serious first amendment questions." Id. at 717.

Press Access

In a somewhat analogous context, Judge Kennedy rejected the government's effort to shield certain litigation papers from public scrutiny in CBS v. United States District Court, 765 F.2d 823 (1985). The government had persuaded the district court that it should not be forced to reveal documents sealed in connection with a motion to reduce the sentence of one of John DeLorean's co-defendants. Judge Kennedy disagreed:

> The government and the trial court ... went so far as to assert that the government's interest would be threatened if even its position of support or opposition to the motion were made known. That idea is as remarkable as it is meritless.

Id. at 826. At the same time, Judge Kennedy "assumed that the right of access to criminal proceedings could, in appropriate circumstances, be limited to protect private property interests as well as the defendant's right to a fair trial." Id. at 825. The implications of that "assumption" are potentially troubling; the issue, however, was not directly addressed in the CBS case.

Libel

Judge Kennedy has written two libel decisions. One involves substance, the other procedure. In Koch v. Goldway, 817 F.2d 507 (1987), the Mayor of Santa Monica was sued for defamation for making the following comment about a local political opponent: "There was a well-known Nazi war criminal named Ilse Koch during World War II. Like Hitler, Ilse Koch has never been found. Is this the same Ilse Koch? Who knows?" Judge Kennedy ruled that the statement was protected opinion and therefore not actionable. He reached this conclusion by examining both the words and the context in which they were uttered, placing particular stress on the fact that the speech occurred in the midst of a political debate:

> The law of defamation teaches ... that in some instances speech must seek its own refutation without intervention by the courts. ... Base and malignant speech is not necessarily actionable.

Id. at 510.48/

In Church of Scientology of California v. Adams, 584 F.2d 893 (1976), Judge Kennedy addressed the important question of whether a libel action can be brought against a newspaper in any state where the newspaper is sold. The case arose after the St. Louis Post-Dispatch published a series of articles on the Church

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48/ Judge Kennedy also rejected the claim that the Mayor's speech created a cause for intentional infliction of emotional distress. Although not fully analyzed, this holding is worth noting since the Supreme Court is presently considering whether defamation and intentional infliction of emotional distress are governed by the same constitutional standards. See Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986), cert. granted, 55 U.S.L.W. 3657 (1987).

of Scientology of Missouri. The national church, located in California, then brought suit in California. The only basis for jurisdiction in California was that 156 copies of the St. Louis paper had been mailed to subscribers in the state. Judge Kennedy ruled that this was insufficient to make a newspaper defend a libel action in a distant forum. While cautioning that jurisdictional rules did not change merely because a newspaper was involved, Judge Kennedy wrote:

> The nature of the press is such that copies of most major newspapers will be located throughout the world, and we do not think it consistent with fairness to subject publishers to personal jurisdiction solely because an insignificant number of copies of their newspaper were circulated in the forum state.

Id. at 897.

Political Speech

The constitutional protection for political speech and association has not been a major focus of Judge Kennedy's writings. It has been a tangential issue, however, in two of his decisions. United States v. Freeman, 761 F.2d 549 (1985), involved a criminal prosecution against a self-proclaimed tax protestor who was convicted of counseling others to evade the tax laws based, in part, on a series of public workshops he conducted. Citing the Brandenburg standard,[49/] Judge Kennedy reversed the conviction on the ground that "the jury should have been charged that the expression was protected unless both the

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49/ See Brandenburg v. Ohio, 395 U.S. 444 (1969).

intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act ...." Id. at 552.[50/]

In United States v. Abel, 707 F.2d 1013 (1983), aff'd, 469 U.S. 45 (1984), the issue was whether a defense witness in a criminal trial could be impeached by bringing out the fact that both the witness and the defendant had belonged to a secret prison organization whose members were allegedly committed to lying on each other's behalf. The majority ruled that this associational connection was constitutionally irrelevant without some showing that the witness shared the association's objectives. Judge Kennedy dissented, arguing that the majority's rule was appropriate when group membership was used as a basis for punishment but not when it was used only for purposes of impeachment. In Judge Kennedy's words, "[t]he witness who is impeached by membership in a group sworn to perjury is subject to no sanction other than that his testimony may be disbelieved." Id. at 1017. The Supreme Court subsequently accepted Judge Kennedy's view.

Religion

Judge Kennedy has written only one opinion dealing with the free exercise and establishment clauses of the First Amendment. In Graham v. Comm'r of Internal Revenue, 822 F.2d 844 (1987), Judge Kennedy upheld the Commissioner's disallowance of certain

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50/ In his testimony, Judge Kennedy endorsed the Brandenburg standard. He stated that he knew of "no substantial, responsible argument which would require the overruling of that precedent." Hearing Testimony, Dec. 15, 1987, at 229.

payments made to the Church of Scientology, claimed as charitable deductions by church members. Writing for a unanimous panel, Kennedy found no violation of the taxpayers' free exercise rights. He doubted that they had shown a burden on the right of free exercise, but, even if there was a burden, Kennedy found compelling the government's interest in "a neutral and enforceable taxation system." Id. at 853. Finally, Kennedy dismissed the Scientologists' establishment clause claim, finding it without support in the record. Ibid.

At the hearings, Kennedy provided only minimal elaboration of his views on church-state relations. In response to a general question about the establishment clause, Kennedy testified that "it is a fundamental value of the Constitution ... that the Government does not impermissibly assist or aid all religions or any one religion over the other."[51/] However, he also made a point of noting a tension between the establishment clause and the free exercise clause.[52/]

51/ See Hearing Testimony, Dec. 14, 1987, at 208. In a 1968 interview with the McGeorge School of Law newspaper, Kennedy was quoted "as saying that the Court should leave room for some expressions of religion in State-operated places. There should be a place for some religious experience in schools or a Christmas tree in a public housing center." Id. at 206. When asked about this, Kennedy stated that he did not recall the article or the interview. He also suggested that the comments attributed to him no longer reflect his views: "I would say that the law would be an impoverished subject if my views didn't change over 20 years." Ibid.

52/ Ibid.

CRIMINAL LAW AND PROCEDURE

Judge Kennedy has written well over 100 opinions in the criminal law area. His decisions show great sensitivity to the needs of law enforcement. Nevertheless, Judge Kennedy has been willing to reverse a criminal conviction when faced with evidence of police misconduct.[53/]

Several of Judge Kennedy's unpublished speeches also address criminal law issues. The nominee has questioned the wisdom of rules adopted in the criminal area to protect constitutional rights. For example, in a 1981 speech, Kennedy noted that "some of the refinements we have invented for criminal cases are carried almost to the point of an obsession. Implementing these rules has not been without its severe cost."[54/] At the South Pacific Judicial Conference, Kennedy also criticized judicial indifference to the rights of crime victims:

> The significant criminal law decisions of the Warren Court focused on the relation of the accused to the state, and the police as an instrument of the state. Little or no thought was given to the position of the victims.[55/]

53/ Senator Leahy noted, without contradiction, that Kennedy ruled for the defendant in about a third of the criminal cases he heard, and for the government in the remaining two-thirds. Hearing Testimony, Dec. 15, 1987, at 136.

54/ A. Kennedy, Unpublished Speech, McGeorge School of Law Commencement, Sacramento, CA (May 30, 1981), at 2. When asked about this statement at the hearings, Kennedy admitted that it was "pretty broad rhetoric" and explained that he "had the Fourth Amendment in mind generally." Hearing Testimony, Dec. 15, 1987, at 137.

55/ A. Kennedy, Unpublished Speech, South Pacific Judicial Conference, Auckland, New Zealand (March 3-5, 1987), at 8.

Judge Kennedy stressed the fact that appellate judges "are in an ideal position either to mandate or, by persuasion, to bring about important and needed reforms to protect victims and indeed other witnesses."[56] It is unclear what impact, if any, this solicitude for victims would have on Judge Kennedy's decisions in criminal cases.[57]

Fourth Amendment

Judge Kennedy's view of the exclusionary rule raises significant civil liberties concern. Judge Kennedy believes that the rule exists solely to deter police misconduct. It therefore has no application to the "good faith and sensible actions" of the police:

> If the exclusionary rule becomes an end in itself and the courts do not apply it in a sensible and predictable way, then one approach is to reexamine it altogether. We do not have that authority; but we do have the commission, and the obligation, to confine the rule to the purposes for which it was announced.
>
> In this case, the exclusionary rule seems to have acquired such independent force that it operates without reference to any improper conduct by the police.

56/ Id. at 8.

57/ In his hearing testimony, Judge Kennedy recited similar expressions of concern for the rights of crime victims. See, e.g., Hearing Testimony, Dec. 14, 1987, at 159-160; Dec. 15, 1987, at 76-77. However, with the exception on one case involving restitution as a condition of parole, Kennedy indicated that victims' rights had not played a role in his criminal law decisions. Id. at 171.

United States v. Harvey, 711 F.2d 144 (1983) (dissent from denial of rehearing en banc).[58/]

Judge Kennedy's best known Fourth Amendment decision is probably his dissent in United States v. Leon, No. 82-1093 (Jan. 19, 1983) (unpublished), rev'd, 468 U.S. 897 (1984). The Court of Appeals affirmed the district court's holding that a search warrant was invalid because based on information that was both over five-months-old and failed to establish the credibility of the informant. In dissent, Judge Kennedy argued that the warrant was valid because the five-month-old information had been validated by "a continuing course of suspicious conduct." Ibid. While noting that the police investigation was "conducted with care, diligence, and good faith," id. at 5, Judge Kennedy's dissent was not based on the "good faith" of the police officers.[59/] The Supreme Court reversed, and established a "good faith" exception to the exclusionary rule.

58/ See also Satchell v. Cardwell, 653 F.2d 408, 414 (1981) (concurring opinion) (questioning application of the "iron logic of the exclusionary rule" to the "good faith and sensible actions the officer took here"), cert. denied 454 U.S. 1154 (1982).

59/ A number of press accounts have mischaracterized Kennedy's dissent in Leon. See The National Law Journal, November 23, 1987 (in Leon, Kennedy "urged an exception where police act in good faith"); see also The National Conservative Weekly, November 21, 1987, p. 7 (claiming that Kennedy's dissent in Leon was "so persuasive" that it was adopted by the Supreme Court).

At the hearings, Kennedy acknowledged this: "I get somewhat ... more credit for the Leon case than I deserve, because I did not find that there had been an illegal search in that case." Hearing Testimony, Dec. 14, 1987, at 204.

Judge Kennedy has already extended the "good faith" exception beyond the rule established in Leon. In United States v. Peterson, 812 F.2d 486, 491-92 (1987), for example, a case involving a joint venture between United States and Philippine narcotics authorities, Judge Kennedy applied the "good faith" exception to "reliance on foreign law enforcement officers' representations that there has been compliance with their own law." Id. at 492. He acknowledged that "Leon speaks only in terms of good faith reliance on a facially valid search warrant," but did not consider this dispositive:

> Holding [U.S. officers] to a strict liability standard for failings of their foreign associates would be even more incongruous than holding law enforcement officials to a strict liability standard as to the adequacy of domestic warrants. We conclude that the good faith exception to the exclusionary rule announced in Leon applies to the foreign search.

Ibid.[60/] But see United States v. Spilotro, 800 F.2d 959, 968 (1986) (refusing to apply the "good faith" exception to facially overbroad warrant).

60/ At the hearings, however, Kennedy indicated that he would proceed with caution in this area:

> Now whether or not [the good faith exception] should apply to warrantless searches in the United States is a question that I have not addressed, and I would want to consider very deliberately whether or not the rule should be extended to those instances because you then get, as you know, into the problem of objective versus subjective bad faith and you must by very careful to ensure that by the exception you do not swallow the rule.

Hearing Testimony, Dec. 14, 1987, at 205-206.

Judge Kennedy has upheld warrantless searches in a variety of contexts, especially where there is no evidence of police misconduct.[61] In United States v. Allen, 633 F.2d 1282 (1980), cert. denied, 454 U.S. 833 (1981), Kennedy held that a ranch owner had no reasonable expectation of privacy in portions of his property observed and photographed by a Coast Guard helicopter conducting aerial surveillance to uncover evidence of drug smuggling.[62] The Supreme Court subsequently upheld the constitutionality of warrantless aerial surveillance. See California v. Ciraolo, 476 U.S. ___, 90 L.Ed.2d 210 (1986). Justice Powell, joined by Justices Brennan, Marshall and Blackmun, dissented. Justice Powell's objections to the search in Ciraolo are equally applicable to the search in Allen:

> Here, police conducted an overflight at low altitude solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant.

Id. at 225.[63]

61/ See, e.g., United States v. Sledge, 650 F.2d 1075 (1981); United States v. Gardner, 627 F.2d 906 (1980); United States v. Sherwin, 539 F.2d 1 (1976) (en banc); United States v. Scharf, 608 F.2d 323 (1979).

62/ In a speech, Kennedy warned that "[T]he constitutional order today is under a tremendous attack by criminal conspiracies that operate and profit from sale of illegal drugs." Rotary Club Speech, supra, at 2. He described some responses to this "drug invasion": "As for the drug traffickers themselves, we have ruled that aerial photo intelligence, radar and infrared surveillance, and coastguard boardings for vessel inspection, whether inside or outside the territorial twelve mile limit, are lawful for the purpose of interdicting the drug trade." Id. at 3.

63/ Judge Kennedy did note, however, that the court was not presented with "an attempt to reduce, by the use of vision-enhancing devices or the

(continued...)

When faced with instances of police misconduct or over-reaching, however, Judge Kennedy has applied the exclusionary rule, even where it means overturning convictions. In United States v. Cameron, 538 F.2d 254 (1976), one of his earliest opinions in this area, Kennedy reversed a drug conviction based on evidence obtained by a body cavity search that included "two forced digital probes, two enemas, and forced [administration of] a liquid laxative." Id. at 258. Judge Kennedy recognized the magnitude of the intrusion involved and concluded that

> [i]n a situation thus laden with the potential for fear and anxiety, a reasonable search will include beyond the usual procedural requirements, reasonable steps to mitigate the anxiety, discomfort, and humiliation that the suspect may suffer.

Ibid. Finding that the procedures employed "were lacking in these respects," Kennedy held that the search violated the Fourth Amendment.64/ Ibid.

Similarly, in United States v. Rettig, 589 F.2d 418 (1978), Kennedy was willing to look behind a facially valid warrant, to examine the circumstances under which it was issued and executed.

63/ (...continued)
incidence of aerial observation, the privacy expectation associated with the interiors of residences or other structures." 633 F.2d at 1289.

64/ The opinion expresses concern over the "excesses in both the incidence and the extent of body searches" conducted by the government, and insists that the government "keep careful statistics henceforth and make them available to the United States Attorney," so that the court can determine whether to adhere to its rule that a warrant is not always required in body search cases. 538 F.2d at 259-60. But see United States v. Shreve, 697 F.2d 873 (1983) (applying circuit precedent, Kennedy upheld a warrantless X-ray search for body cavity smuggling).

Finding bad faith on the part of the government, he reversed several drug convictions obtained as a result. The record established that when DEA agents applied to a state court judge for a warrant to search for evidence of marijuana possession, they did not disclose the fact that a federal magistrate had denied their application the day before, nor did they reveal the true purpose of the search, namely, to obtain evidence of a cocaine conspiracy. Kennedy ruled that,

> [b]y failing to advise the judge of all the material facts, including the purpose of the search and its intended scope, the officers deprived him of the opportunity to exercise meaningful supervision over their conduct and to define the proper limits of the warrant.

Id. at 422. He found that because "the agents did not confine their search in good faith to the objects of the warrant. ... this warrant became an instrument for conducting a general search." Id. at 423.

Finally, in United States v. Penn, 647 F.2d 876, cert. denied, 449 U.S. 903 (1980), a majority of the court reversed a lower court decision granting the defendant's motion to suppress a jar of heroin found in her backyard. The police had obtained this evidence by offering $5 to the defendant's five-year-old son. Although the court disapproved of this police tactic, it nevertheless found that the action did not "shock the conscience," id. at 880, and was not "unreasonable" under the Fourth Amendment. Id. at 883. The court also found that the police's interaction with the child did not violate any

legitimate expectation of privacy held by the mother. Ibid. It found that "no 'family' interest of constitutional stature is implicated here." Id. at 884.

Judge Kennedy dissented. In his view,

> [t]he question is whether the police can use the search of a residence as the occasion for a severe intrusion upon the relation between a mother and a child who has not reached the age of reason. Her relationship to the child belongs intimately to the mother ... . To say that she has no standing to complain of the stark intrusion upon it in this case is to assume a negative to the very question in issue, namely, to what extent the law can protect the relationship from disruption in the home.

Id. at 888 (citation omitted). He pointed out that courts have protected the parent-child relationship "where the threat of disruption is in some respects more attenuated than in the circumstances of the case before us." Ibid. He concluded that this police practice was "both pernicious in itself and dangerous as precedent. Indifference to personal liberty is but the precursor of the state's hostility to it." Id. at 889.

Fifth Amendment

Self-Incrimination

Judge Kennedy takes a narrow view of the kind and degree of compulsion prohibited by the Fifth Amendment privilege against self-incrimination. For example, in Ryan v. Montana, 580 F.2d 988 (1978), cert. denied, 440 U.S. 977 (1979), Kennedy concluded that the Fifth Amendment does not require a state to grant a probationer use immunity for testimony given at a probation revocation and deferred sentencing hearing, when he is under

indictment for the act that constitutes the probation violation. Because no inference of guilt was or could have been drawn from the defendant's silence at the probation revocation proceeding, Judge Kennedy found that these procedures do not violate the Fifth Amendment as construed by the Supreme Court. Judge Kennedy's opinion did, however, question the wisdom of the challenged practice:

> If our opinion as to the wisdom of the Montana rule were dispositive, we might prefer the California procedure, ... which provides use immunity for a probationer's testimony if it is given at a revocation hearing held prior to trial on criminal charges which were the basis for the revocation proceeding.

Id. at 994.

Matter of Fred R. Witte Center Glass No. 3, 544 F.2d 1026 (1976), raised the question whether a taxpayer under investigation by the Internal Revenue Service could decline to produce his accountant's work papers. The majority held that production was compelled under Fisher v. United States.[65/] Judge Kennedy concurred. He emphasized that Fisher might not apply to other papers, "especially those of a more private nature"; he suggested that there was a "high probability that an order to produce personal papers may compel assertions or communications that fall within the [Fifth Amendment] privilege." Id. at 1029.

65/ 425 U.S. 391 (1976).

Miranda

At the hearings, Kennedy characterized Miranda as "a sweeping, sweeping rule," one which "wrought almost a revolution."[66/] He also questioned the soundness of the decision: "[I]t is not clear to me that it necessarily followed from the words of the Constitution. And yet it is in place now, and I think it is entitled to great respect."[67/] Despite these reservations, as a court of appeals judge, Kennedy has generally applied this precedent, even at the cost of reversing convictions.

In United States v. Scharf, 608 F.2d 323 (1979), for example, Judge Kennedy reversed a conviction where Miranda warnings had not been delivered during the course of what he found to be custodial interrogations. He cited "[t]he intensity of the surveillance, the repeated interrogations, and the fact that [the defendant] had been subject to custodial interrogation twenty-four hours before" as "factors that combine to render the last interrogation a custodial one." Id. at 325.

In Neuschafer v. McKay, 807 F.2d 839 (1987), the defendant was convicted of murdering a fellow inmate and sentenced to death. The district court dismissed his petition for a writ of habeas corpus. In an opinion by Judge Kennedy, the Court of Appeals remanded for an evidentiary hearing on whether

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66/ Hearing Testimony, Dec. 15, 1987, at 142.

67/ Ibid. Kennedy also testified that the rule established in Miranda may have gone "beyond the necessities of the case." Id. at 143.

incriminating statements were obtained in violation of Edwards v. Arizona.[68/] Kennedy found that the district court's reliance on the state trial court record was improper when the state's highest court characterized the record as "unclear." He noted that, in habeas corpus proceedings, "deference must be granted to the findings of state appellate courts as well as state trial courts." Id. at 841.[69/] After an evidentiary hearing, the district court concluded that the incriminating statements were admissible under Edwards. This time the Court of Appeals, again per Kennedy, affirmed. Neuschafer v. Whitley, 816 F.2d 1390 (1987).

By contrast, Judge Kennedy affirmed a conviction in United States v. Contreras, 755 F.2d 733 (1985), cert. denied sub nom. Soto v. United States, 474 U.S. 832 (1985), which involved a federal prosecution of prison gang members who had testified under immunity in a state investigation. Federal agents gave the standard Miranda warnings, but also advised defendants that the state grants of immunity were not binding on the federal court and did not apply in the federal investigation. Using a very lax standard -- "we find no objective flaw and no necessarily misleading inferences in the advice given by the federal agents"

[68/] 451 U.S. 477 (1981).

[69/] The remand provoked a sharp dissent from Judge Chambers, who maintained that there could be no doubt as to Neuschafer's guilt. He read the majority "as simply saying our district judge can make a better record and [we] should not indulge in a gamble by one of our en bancs or risk the Supreme Court handling the case now." 807 F.2d at 842.

-- Judge Kennedy concluded that the defendants had made a knowing and intelligent waiver of their Miranda rights.70/ Id. at 737.

Similarly, in United States v. Edwards, 539 F.2d 689 (1976), Judge Kennedy upheld a rape conviction based on a confession made after the suspect had been in custody for more than six hours without being taken before a magistrate. The decision recites that the suspect had been "advised of his rights and signed a waiver thereof." Id. at 691. Despite the delay in arraignment, Judge Kennedy refused to exclude the confession:

> Confessions given more than six hours after arrest during a delay in arraignment are, however, not per se involuntary. The delay is only one factor, to be considered in light of all the surrounding circumstances. The trial court found that the delay in arraignment was caused solely by a shortage of personnel and vehicles to transport the suspect a distance of 125 miles to Tucson, the site of the nearest available magistrate. There was no evidence that the defendant was the subject of oppressive police practices prior to the admission.

Ibid (citation omitted).

Double Jeopardy

Judge Kennedy frequently dissents where the majority reverses a criminal conviction on double jeopardy grounds. On the facts presented in these cases, he saw no constitutional impediment to reprosecution for a more serious offense or the

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70/ Judge Canby dissented. He found that the statements were "fatally misleading" because "[t]hey failed to make clear that federal authorities were precluded from making use of the statements that the defendants had already given under a promise or grant of immunity by state authorities." 755 F.2d at 738.

imposition of cumulative sentences for convictions proscribing the same conduct.

For example, in Adamson v. Ricketts, 789 F.2d 722 (1986) (en banc), rev'd, 107 S.Ct. 2680 (1987), a capital case, the majority concluded that the double jeopardy clause barred reprosecution for first degree murder of a defendant who pled guilty to second degree murder and that the defendant had not waived his rights under the terms of his plea agreement. Judge Kennedy dissented. He maintained that a conviction resting on a plea agreement does not protect a defendant from trial for a more serious offense if the plea is later set aside by reason of the defendant's breach of the agreement. The Supreme Court substantially adopted Judge Kennedy's analysis.

Arizona v. Manypenny, 608 F.2d 1197 (1979), rev'd, 451 U.S. 232 (1981), involved a state prosecution of federal border patrolman, which was removed to federal court. The district judge set aside the jury's guilty verdict and entered a judgment of acquittal. The majority dismissed the state's appeal, finding no federal statutory authority for appellate jurisdiction. Judge Kennedy dissented. He maintained that

> it was neither appropriate nor necessary for Congress to speak to the authority of prosecutors who represent a separate state as the sovereign initiating criminal charges. That question is solely the prerogative of the State of Arizona, and the State allows appeals in cases such as the one before us.

Id. at 1202. 71/

In Brimmage v. Sumner, 793 F.2d 1014 (1986), Judge Kennedy denied habeas relief, upholding convictions for robbery and murder in the perpetuation of robbery even though robbery is a lesser included offense of felony murder. The cumulative sentences amounted to life without parole plus fifteen years. Judge Kennedy stated:

> [E]ven if the two statutes proscribe the same conduct, the Double Jeopardy Clause does not prevent the imposition of cumulative punishments if the state legislature clearly intends to impose them. ... We must accept the state court's interpretation of the legislative intent for the imposition of multiple punishments, although we are not bound by that court's ultimate conclusion concerning whether such punishments violate the Double Jeopardy Clause.

Id. at 1015 (citations omitted). 72/

71/ On remand, Kennedy reversed the district court's judgment of acquittal. See 672 F.2d 761, cert. denied, 459 U.S. 850 (1982).

72/ Accord Haynes v. Cupp, 827 F.2d 435 (1987); United States v. Meyer, 802 F.2d 348 (1986); United States v. Bennett, 702 F.2d 833 (1983).

Judge Kennedy did not find an appearance of vindictive prosecution in United States v. Gallegos-Curiel, 681 F.2d 1164 (1982), involving a felony indictment for illegal re-entry after the defendant pled not guilty to a misdemeanor charge at an initial appearance before the magistrate. The prosecutor sought the increased charges after reviewing the alien defendant's prior record of illegal entry, which had not been available to the magistrate. In reversing the district court, Judge Kennedy explained:

> When increased charges are filed in the routine course of prosecutorial review or as a result of continuing investigation, ... there is no realistic likelihood of prosecutorial abuse, and therefore no appearance of vindictive prosecution arises merely because the prosecutor's action was taken after a defense right was exercised.

Id. at 1169 (citations omitted).

Sixth Amendment

Confrontation Clause

Barker v. Morris, 761 F.2d 1396 (1985), cert. denied, 474 U.S. 928 (1987), is probably Judge Kennedy's most significant Confrontation Clause decision. In Barker, he ruled that the admission of videotaped testimony of a witness who subsequently died did not violate the confrontation clause, despite the fact that the defendant had no opportunity to cross-examine the witness.[73/] Judge Kennedy found that the testimony had "substantial and specific guarantees of trustworthiness and reliability." Id. at 1401. He also recognized that the confrontation clause is more than a guarantee of reliability:

> Though reliability may be the crux of analysis in determining both hearsay and Confrontation Clause violations, the Confrontation Clause has acquired in our system a value separate from the assurance of reliability. In a basic sense, the Confrontation Clause is one measure of the government's obligation to present its case in a form subject to open scrutiny and challenge by the accused, the trier of fact, and the public.

Id. at 1400. Nevertheless, Judge Kennedy evaluated the taped testimony almost exclusively in terms of its reliability and found no confrontation clause violation. His decision, however, is not inconsistent with current Supreme Court doctrine.[74/]

73/ The defendant was a fugitive at the time the testimony was given. The witness was extensively cross-examined by counsel for two co-defendants. See 761 F.2d at 1398.

74/ See, e.g., United States v. Inadi, 475 U.S. ___, 89 L.Ed.2d 390 (1986) (holding that admission of taped conversations of non-testifying co-conspirators did not violate the confrontation clause, even without a showing (continued...)

In Chipman v. Mercer, 628 F.2d 528 (1980), in contrast, Kennedy upheld a district court order overturning a state robbery conviction. In this case, the trial court had refused to allow cross-examination of the sole eyewitness to a robbery to show bias, despite the fact that the witness had previously accused residents of the facility for the mentally retarded where the defendant lived of theft and had tried to have the facility closed. Kennedy noted that, while

> a trial court normally has broad discretion concerning the scope of cross-examination, ... a certain threshold level of cross-examination is constitutionally required, and in such cases the discretion of the trial judge is obviously circumscribed.

Id. at 530. He found that full cross-examination was particularly important because this witness' testimony "was very significant to the case." Id. at 532. See also Burr v. Sullivan, 618 F.2d 583 (1980) (affirming order overturning a state arson conviction where defense counsel was prohibited from asking accomplices about juvenile offenses).75/

74/ (...continued)
of unavailability; context provided adequate indicia of reliability).

75/ Where Judge Kennedy has found the cross-examination allowed to be adequate and effective, however, he has rejected claims that limitations on cross-examination violated that confrontation clause. See, e.g., Bright v. Shimoda, 819 F.2d 227 (1987) (no violation for denial of cross-examination on a collateral matter); United States v. Kennedy, 714 F.2d 968, 973-74 (1983), cert. denied, 465 U.S. 1034 (1984) (no confrontation clause violation where cross-examination was only denied on collateral matters; jury received "ample presentation of appellant's theory").

Right to Counsel

Judge Kennedy has written very few opinions on this subject. While they tend to show a lack of receptivity to appeals based on claims of ineffective assistance of counsel, no persistent pattern emerges. In Satchell v. Cardwell, 653 F.2d 408, 414 (1981), cert. denied, 454 U.S. 1154 (1982), Judge Kennedy concurred in the panel's finding that defense counsel's failure to seek suppression of the fruits of a warrantless search did not constitute ineffective assistance of counsel. The panel assumed, without deciding, that Stone v. Powell[76/] did not preclude habeas review of an ineffective assistance claim grounded in failure to make a Fourth Amendment argument.[77/] In a concurring opinion, Kennedy stated:

> Even if we are permitted to circumvent Stone v. Powell in this way, we should be cautious about turning sixth amendment cases into fourth amendment ones unless there is an absolute necessity to do so. Based on the trial court's observation of the trial counsel's skill, and the fact that the lawyer studied the fourth amendment point and researched it carefully, I would determine he was competent without further discussion of the fourth amendment issues.

Id. at 414.

In United States v. Pederson, 784 F.2d 1462 (1986), Kennedy also found no Sixth Amendment violation. He rejected the claim that the district court's refusal to grant a continuance deprived

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76/ 428 U.S. 465 (1976).

77/ This issue was later resolved by the Supreme Court in favor of review. See Kimmelman v. Morrison, 477 U.S. ___, 91 L.Ed.2d 305 (1986).

the defendant of effective assistance of counsel, since he continued to be represented by local counsel and substitute lead counsel was familiar with the case. Similarly, in Greenfield v. Gunn, 556 F.2d 935 (1977), cert. denied, 434 U.S. 928 (1977), Kennedy refused to find that defense counsel was ineffective for failing to raise defenses of insanity and unconsciousness. However, he did express concern over the fact that the defendant was represented by a series of different attorneys from the public defender's office:

> This type of horizontal representation may at times be an inevitable result of workload and budget constraints imposed on a public defender's office. But unless each attorney scrupulously acts to insure that all who participate in the case are informed of every aspect of that attorney's representation, there is some danger that the defendant may be deprived of effective legal assistance.

Id. at 938.

Eighth Amendment

Death Penalty

Judge Kennedy has published opinions in only a handful of capital cases. Although he has been willing to uphold convictions in capital cases,[78/] it is difficult to predict how

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78/ Kennedy's opinions in two other capital cases, Adamson v. Ricketts, 789 F.2d 722 (1986) (en banc), rev'd, 107 S. Ct. 2680 (1987), and Neuschafer v. McKay, 807 F.2d 839, after remand Neuschafer v. Whitley, 816 F.2d 1390 (1987), are included in the discussion of the nominee's double jeopardy and Miranda decisions.

On the second appeal in Neuschafer, Kennedy rejected two other claims raised by the defendant. First, he found it unnecessary to address the claim that one of the three aggravating factors, that the murder "involved torture, depravity of mind or the mutilation of the victim" used an arbitrary

(continued...)

the nominee would vote in any particular capital case. On balance, his opinions show a concern for procedural fairness and a willingness to apply precedent favorable to capital defendants.

For example, in Vickers v. Ricketts, 798 F.2d 369 (1986), cert. denied, 107 S.Ct 928 (1987), Judge Kennedy granted habeas relief to an Arizona death row prisoner convicted of first degree murder. Although there was evidence from which the jury might have found lack of premeditation, the trial court did not give an instruction for second degree murder, a lesser included offense. Even in the absence of a request for such an instruction, Kennedy found that the omission violated due process principles set forth in Beck v. Alabama[79/] and Hopper v. Evans.[80/] Based on the evidence, Kennedy stated that

> [a] jury given the choice between first and second degree murder might well return a verdict of either first degree murder or second degree murder. Under the Supreme Court's decisions in Beck and Hopper, due

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78/ (...continued)
standard. Under state law, in the absence of mitigating factors, the presence of either of the other two aggravating factors (which Neuschafer did not challenge), would have permitted the jury to impose the death sentence. 816 F.2d at 1393. The second claim was that the sentence was disproportionate. Citing Pulley v. Harris, 465 U.S. 37 (1984), Kennedy ruled that "constitutional principles do not require the federal court in habeas corpus proceedings[] to engage in any comparative proportionality review." Id. at 1394.

79/ 447 U.S. 625 (1980). The Supreme Court held that in capital cases, where the evidence would support conviction of a lesser included offense, the jury must be instructed to consider that alternative.

80/ 456 U.S. 605 (1982). This case reaffirmed Beck, but made clear that a lesser included offense instruction was constitutionally mandated only if fairly supported by the evidence.

> process required that the jury be given that choice.

Id. at 373.

At the hearings, Kennedy's testimony on the subject of the death penalty was surprisingly reserved. To the apparent dismay of some of the Judiciary Committee's conservative members, Judge Kennedy refused to commit himself to the constitutionality of the death penalty. In response to Senator Humphrey's concern over the nominee's "unwillingness to recognize 200 years or so of validation of capital punishment," Kennedy stated:

> Well, I guess we have a disagreement as to whether or not it [the constitutionality of the death penalty] is well settled, Senator. These decisions are very close. Some justices have indicated that it is unconstitutional, and I simply think that I should not take a specific position on a constitutional debate of ongoing dimension.[81/]

ACCESS TO THE FEDERAL COURTS

Judge Kennedy has authored more than fifty opinions on issues relating to access to the federal courts. Judge Kennedy has consistently taken a strict view of statutes of limitations and has upheld dismissals, even in civil rights cases, on the ground that the suit is time barred. On the other hand, his decisions tend to be narrowly tailored to the particular issue at hand.

81/ Hearing Testimony, Dec. 15, 1987, at 207-208. See also Dec. 14, 1987, at 213; Dec. 15, 1987, at 197.

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Statutes of Limitations

In Allen v. Veterans Admin., 749 F.2d 1386 (198[illegible] the plaintiff mistakenly named the Veterans Administrat[illegible] defendant. By the time the suit was amended to [illegible] the United States as defendant, the statute of limitations had expired. Judge Kennedy's opinion affirmed dismissal of the case as time barred. Likewise, in Hatchell v. United States, 776 F.2d 244 (1985), Judge Kennedy upheld the district court's dismissal of a prisoner's complaint filed three days after expiration of the statute of limitations. The prisoner had filed a claim, which was denied. He then filed an action six months after receipt of denial of the claim; the statute required that it be filed within six months of the postmark.82/

Pavlak v. Church, 681 F.2d 617 (1982), vacated and remanded, 463 U.S. 1201 (1983), on remand, 727 F.2d 1425 (1984), involved a civil rights challenge to an allegedly unlawful wiretap. In Pavlak, the district court refused to certify a class action. After denial of certification, a putative class member attempted to file suit, contending that the statute of limitations had been tolled while the certification issue was pending. The Supreme Court had taken this position in Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 157 n.13 (1974), stating "[c]ommencement of a class action tolls the applicable statute as to all class members."

82/ But see Martin v. Donovan, 731 F.2d 1415 (1984) (failure to appeal within the time bar should not act as administrative res judicata when plaintiff was unaware of implications of failure to appeal).

Characterizing the footnote in Eisen as "puzzling," 681 F.2d at 620 (citation omitted), Judge Kennedy refused to follow it. The Supreme Court vacated and remanded. On remand, Judge Kennedy applied the tolling rule, but refused to reinstate the claim. Instead, he remanded to the district court for a factual determination of when plaintiff could or should have discovered her cause of action. 727 F.2d at 1428-29.

The issue in Lynn v. Western Gillette, Inc., 564 F.2d 1282 (1977), was when the 90-day period for bringing a private civil action under Title VII begins to run. The statute makes clear that EEOC notice or issuance of a formal right to sue letter triggers the time period. In Lynn, the EEOC had delayed its investigation of the plaintiff's sex discrimination charges. It then sent plaintiff the wrong notice. As a result of EEOC inaction and error, almost three years passed from the time the plaintiff filed charges and initiation of the lawsuit. Judge Kennedy allowed the suit to go forward, but gratuitously offered grounds for limiting plaintiff's relief:

> Our determination of the type of notice necessary to begin the period in which a private action may be filed does not imply that a plaintiff's lack of diligence in filing an action must be overlooked. ... The complainant should not be permitted to prejudice the employer by taking advantage of the Commission's slowness in processing claims or by procrastinating while being aware that the Commission intends to take no further action. Under such circumstances, it is proper for the district court, in the exercise of its equitable discretion, to take the plaintiff's lack of diligence into account in determining the amount of back

> pay, if any, to be awarded the plaintiff should he prevail on the merits.

Id. at 1287-88.

In EEOC v. Alioto Fish Co., 623 F.2d 86 (1980), the EEOC had initiated suit 62 months after a complaint had been filed and after many key witnesses had died. Judge Kennedy's opinion for the court affirmed a dismissal on the basis of laches. Nevertheless, in Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (1980), Judge Kennedy reversed the district court's dismissal of an environmental suit on grounds of laches. He stated: "Laches is not a favored defense in environmental cases. Its use should be restricted to avoid defeat of Congress' environmental policy." Id. at 779 (citation omitted).[83/]

Standing

Judge Kennedy's most important standing case is TOPIC v. Circle Realty, 532 F.2d 1273 (1976), cert. denied, 429 U.S. 859 (1976), in which he denied standing in a housing discrimination case. Three years later, the Supreme Court rejected his view in Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), a 7-2 decision with the majority opinion authored by Justice Powell.

In TOPIC, teams of black and white couples posing as home seekers determined that real estate brokers were practicing racial steering. They brought suit under the Fair Housing Act claiming they had been

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83/ See also Morgan v. Heckler, 779 F.2d 544 (1985) (government not stopped from withholding benefits unless it engaged in affirmative misconduct).

> deprived of the important social and professional benefits of living in an integrated community. Moreover, they have suffered and will continue to suffer embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettoes.

532 F.2d at 1274.

Judge Kennedy reversed the district court's denial of the motion to dismiss, contending, in effect, that only direct victims of the steering practices had standing. The Supreme Court, with Justices Rehnquist and Stewart dissenting, held that standing under the Fair Housing Act is coterminous with Article III. "Most federal courts that have considered the issue agree ...," Justice Powell wrote, "The notable exception is the Ninth Circuit in TOPIC. ..." 441 U.S. at 108-09.

By contrast, in Davis v. United States Dept. of Housing and Urban Development, 627 F.2d 942 (1980), the Court of Appeals, per Kennedy, reversed dismissal for lack of standing. In Davis, low-income city residents challenged a Housing and Urban Development block grant which they claimed would prevent construction of low-income housing. Judge Kennedy wrote:

> Causation sufficient to confer standing may result from a defendant's acts or omissions. Plaintiffs claim that they were injured by the nonfederal appellees' failure to expend housing assistance for low-income persons.
>
> ***
>
> Municipal recipients of federal assistance may not so easily avoid challenges to their use of federal funds by threatening to opt out of the program. It is sufficient for standing purposes that the injury alleged

> here "can be traced to the challenged action of the defendant[s] and [is] not injury that results from the independent action of some third party not before the Court."

Id. at 944-45 (citations omitted).

Subject Matter Jurisdiction

In other circumstances, Judge Kennedy has narrowly construed jurisdictional bars to suits in federal court. For instance, in McIntyre v. McIntyre, 771 F.2d 1316 (1985), Judge Kennedy reversed the district court's dismissal of a husband's suit for money damages brought against his ex-wife because of her interference with his child visitation rights. Judge Kennedy wrote that the long-standing domestic relations exception to federal diversity jurisdiction would not bar a claim of tortious interference with visitation rights. See also Knudsen Corp. v. Nevada State Dairy Commission, 676 F.2d 374 (1982) (affirming a refusal of the lower court to abstain).

Additionally, some of Judge Kennedy's opinions overturn lower court decisions dismissing cases for failure to state a claim upon which relief can be granted. In Western Waste Service v. Universal Waste Control, 616 F.2d 1094 (1980), cert. denied, 449 U.S. 869 (1980), the district court dismissed an antitrust suit against a waste disposal company. The Ninth Circuit's decision, authored by Judge Kennedy, reversed the lower court, holding that cases should be dismissed for failure to state a claim only if on the most favorable reading of the plaintiff's complaint it is clear that the plaintiff cannot recover.

Jones v. Taber, 648 F.2d 1201 (1981), involved dismissal of a civil rights suit against prison officials for injuries suffered as a result of a beating by prison guards. The prisoner agreed to a settlement of the suit, but subsequently brought suit in district court. The case was dismissed. Judge Kennedy, writing for the court, reversed, concluding that the earlier settlement did not constitute a voluntary release by the prisoner. He noted that the coercion in the prison and the inmate's lack of understanding of his rights made the settlement highly suspect.84/

DUE PROCESS

Judge Kennedy has written only a handful of opinions which specifically address the issue of procedural due process.

He ruled in favor of fair process for federal employees in Albert v. Chafee, 571 F.2d 1063 (1977), which involved discharge of a civilian employee of the Navy dismissed for minor misconduct. At the employee's disciplinary hearing, new charges

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84/ There are instances in which Judge Kennedy dissented from Ninth Circuit decisions limiting access to the federal courts. In McDonnell Douglas Corp. v. United States District Court for the Central District of California, 523 F.2d 1083 (1975), the court of appeals reversed a decision certifying a class action for damages which resulted from an airplane crash. Judge Kennedy dissented, arguing that the class should have been certified and, in any event, contending that the case should have been heard en banc by the Ninth Circuit. See also Scharf v. United States Attorney General, 597 F.2d 1240 (1979) (reversing district court's grant of summary judgment in favor of the government in a case involving the deportation of a minor alien).

There are also, however, many decisions in which Judge Kennedy rules against federal jurisdiction. E.g., Portland Police Ass'n v. City of Portland, 658 F.2d 1272 (1981) (dismissing as not justiciable suit by police association).

were levelled. The court held that failure to give advance notice of all the charges violated due process and applicable statutory and regulatory procedures. In a one-paragraph opinion, Judge Kennedy concurred in a one-paragraph opinion: "In light of the trivial nature of the stated charge and the severity of the sanctions imposed, it was prejudicial to consider additional charges of which he had no notice." Id. at 1069.

Vanelli v. Reynolds School District No. 7, 667 F.2d 773 (1982), also involved the procedural protections afforded by the due process clause when a public employee is dismissed. A teacher was dismissed at the midpoint of a one-year contract after female students complained of offensive conduct. The school district dismissed without a pre-termination hearing. At a post-termination hearing, the school district upheld its earlier firing decision. Judge Kennedy found that a pre-termination hearing was constitutionally required, noting that "[t]here is a strong presumption that a public employee is entitled to some form of notice and opportunity to be heard before being deprived of a property or liberty interest." Id. at 778. Moreover, Judge Kennedy remanded for a determination of damages, finding that appellant could recover for injury to liberty as well as property that resulted from his procedural deprivation.

On the other hand, Judge Kennedy rejected a due process claim in Hazelwood Chronic & Convalescent Hospital v. Weinberger, 543 F.2d 703 (1976), vacated on other grounds, 430

U.S. 952 (1977), in which a hospital challenged retroactive application of Medicaid reimbursement regulations for the recapture of depreciation charges. Judge Kennedy reversed the district court and upheld retroactive application. He stated, "[t]he due process clause does not make unconstitutional every law with retroactive effect. ... Only when such retroactive effects are so wholly unexpected and disruptive that harsh and oppressive consequences follow is the constitutional limitation exceeded." Id. at 708.

CONCLUSION

This concludes our report on Judge Kennedy's judicial philosophy and civil rights record. We believe it represents a fair distillation of Judge Kennedy's major decisions in areas involving civil rights and civil liberties, as well as his unpublished speeches and testimony before the Senate Judiciary Committee.

AMERICAN SAMOA GOVERNMENT
OFFICE OF THE PRESIDENT OF THE SENATE
LEGISLATURE OF AMERICAN SAMOA

LETULI TOLOA
President

Tel: (684) 633-4565
633-5231

December 16, 1987

Honorable Joseph Biden
Chairman
Senate Judiciary Committee
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please accept this Concurrent Resolution passed by the Legislature of American Samoa in support of the nomination of Judge Anthony Kennedy to the United States Supreme Court.

In the interest of timely support, we chose to transmit the documents by facsimile rather than by mail. Under separate cover, the official resolution is sent directly to your office and should be there within two weeks.

It is a special and rare honor for the Legislature to be able to support a nominee with whom we have had personal contact. We sincerely hope his nomination is reviewed thoughtfully.

Best wishes for the holidays!

Respectfully,

UTU R.M. SINAGEGE
President Pro Tempore

AMERICAN SAMOA GOVERNMENT
PAGO PAGO, AMERICAN SAMOA 96799
LEGISLATURE OF AMERICAN SAMOA

In reply refer to:

C E R T I F I C A T I O N

Senate Chamber
December 09, 1987

I certify that Senate Concurrent Resolution No. 42 passed on this date in the Senate during its Second Special Session of the Twentieth Legislature of American Samoa.

MRS. SALILO K. LEVI
Secretary of the Senate

House Chamber
December 11, 1987

I certify that Senate Concurrent Resolution No. 42 passed on this date in the House of Representatives during its Second Special Session of the Twentieth Legislature of American Samoa.

MALLY F. OTU
Chief Clerk
House of Representatives

THE TWENTIETH LEGISLATURE
SECOND SPECIAL SESSION S.C.R. NO. 42

SENATE CONCURRENT RESOLUTION

A SENATE CONCURRENT RESOLUTION EXPRESSING THE SUPPORT OF THE LEGISLATURE OF AMERICAN SAMOA FOR THE NOMINATION OF JUDGE ANTHONY KENNEDY TO THE UNITED STATES SUPREME COURT.

WHEREAS, President Reagan recently nominated Judge Anthony Kennedy of the United States Court of Appeals for the Ninth Circuit to be a Justice of the United States Supreme Court; and

WHEREAS, in the minds and hearts of the people of American Samoa, a better choice could not have been made; and

WHEREAS, Judge Kennedy has convincingly demonstrated superior skills as a thoughtful judge in his term on the Court of Appeals, evidence of which has been displayed through his decisions as a member of the Appellate Division of the High Court of American Samoa; and

WHEREAS, in addition to the knowledge gained as a member of our High Court, his Chairmanship of the Pacific Territories Committee of the Judicial Conference of the United States, further steeped Judge Kennedy in the culture and traditions of American Samoa, a rare addition to the knowledge and experience of a Supreme Court nominee; and

WHEREAS, Judge Kennedy's participation in local cases created opportunities to expand his wisdom and understanding of how diverse cultures interplay with traditional American ideals and legal principles, making him more sensitive to social, moral and cultural issues of our time; and

WHEREAS, the unpredictable, difficult issues which demand resolution in the United States courts are frequently rooted in social change and ethnic and cultural tensions, making purely legal analyses seem sometimes insufficient for addressing the real issues; and

NOFOAIGA LUASEFULU
FONO FAAPITOA LONA LUA

I.M.F.M.M. NU. 42

IUGAFONO MALILIE FAATASI MAOTA MAUALUGA

O SE I'UGAFONO MALILIE FA'ATASI MAOTA MAUALUGA E FA'AALIA LE LAGOLAGOINA E LE FONOFAITULAFONO O AMERIKA SAMOA MO LE TOFIAINA O FA'AMASINO ANTHONY KENNEDY MO LE FA'AMASINOGA SILI AOAO O LE IUNAITE SETETE.

TALUAI, o Peresetene Reagan sa tofia i se taimi lata mai Fa'amasino Anthony Kennedy o le Fa'amasinoga Tagi le Malie o le Iunaite Setete mo le Fa'amasinoga Fesi'ita'i e avea ma Fa'amasino o le Fa'amasinoga Sili Aoao o le Iunaite Setete; ma

TALUAI, o manatu ma finagalo o tagata Amerika Samoa, o se tofiga sili lenei ma tatau i lo se isi lava tagata; ma

TALUAI, o Fa'amasino Kennedy sa ia matua fa'aalia i lona fa'autauta loloto ma le atamai o ia o se fa'amasino fa'autauta i ona tausaga umia i le Fa'amasinoga Tagi le malie, sa fa'amaonia lea tulaga i ana iuga ina o avea o ia ma totino o le Vaega Fa'amasinoga Tagi le malie o le Fa'amasinoga Sili o Amerika Samoa; ma

TALUAI, e fa'aopoopo i le atamai sa maua a'o avea ma totino o lo tatou Fa'amasinoga Sili; o lona avea ma ta'ita'ifono o le Komiti o Teritori o le Pasefika o Koneferenisi o Fa'amasinoga o le Iunaite Setete, ua atili ai ona mautu le malamalama o Fa'amasino Kennedy i aganu'u ma agaifanua o Amerika Samoa, o se fa'aopoopoga mauagata i le atamai ma le poto masani mo se tagata tofiaina o le Fa'amasinoga Sili Aoao; ma

TALUAI, o le auai o Fa'amasino Kennedy i fa'amasinoga i'inei ua maua ai avanoa e fa'alaua'itele ai lona atamai ma le fa'autauta i le tele o le lavelave i le aganu'u ma agaifanua ma talitonuga masani o Amerika ma tulaga tau le tulafono, ua matua amanaia ai e ia mataupu tau va fealoa'i, amiotonu ma tulaga fa'aleaganu'u i ona po nei; ma

TALUAI, o mataupu faigata, fa'aletonu e mana'omia tele ona faia iuga i fa'amasinoga o le Iunaite Setete e masani ona amata mai suiga o va fealoa'i ma fete'enaiga o ituaiga tagata ma aganu'u, ua faigata ai ona faia sailiiliga tau le tulafono ma o le tele o taimi e le gafatia ai sailiga o le mea moni; ma

TALUAI, o le lautele, fa'autaga mamao o Fa'amasino Kennedy i mataupu fete'ena'i i le va o tulafono fa'ae'e fa'amalosi ma talitonuga taua o tagata o le a fa'aopoopo ai se lautele mana'omia i le lautele o Fa'amasino Aoao i le faia o iuga o fa'amasinoga nei ma le lumana'i; ma

TALUAI, o se taimi muamua lenei i ona tausaga e 87 tala tusia o le faia ma le Iunaite Setete o Amerika, ua mafai ai e le Teritori o Amerika Samoa ona fa'aalia se taofi e lagolagoina fiafia le tofiaina o se fa'amasino o le Fa'amasinoga Sili Aoao i se tulaga fa'agae'etia lona lagolagoina ma le talitonu i le loloto ma le lautele o le agava'a o lo tatou tagata tofia.

O LENEI, O LE MEA LEA, IA FA'AI'UGAFONOINA E LE MAOTA MAUALUGA O LE TERITORI O AMERIKA SAMOA, MALILIE FA'ATASI LE MAOTA O SUI:

ONA, o le Fonofaitulafono, e fai ma sui o tagata o Amerika Samoa, ua fa'ailoa lona matua lagolagoina o le tofiaina o Fa'amasino Anthony Kennedy i le Fa'amasinoga Sili Aoao o Amerika; ma

IA TOE FA'AI'UGAFONOINA, ona o le Failautusi o le Maota Maualuga ua fa'atonuina e auina kope o lenei i'ugafono malilie fa'atasi i: le Afioga Joseph Biden, Ta'ita'ifono, Komiti Fa'amasinoga Maota Maualuga, Washington, D.C.; Ta'ita'i Komiti o le Soa Komiti o Nofoaga Lautele ma Laueleele; Afioga Ronald Reagan, Peresetene o le Iunaite Setete; Afioga Faipule Fofo I.F. Sunia, Washington, D.C.; ma le Afioga A.P. Lutali, Kovana o Amerika Samoa.

UTU SINAGEGE R.M.
Peresetene Le Tumau
Maota Maualuga

TUANA'ITAU F. TUIA
Fofoga Fetalai, Maota o Sui

STATEMENT

OF

FRANK CARRINGTON,

ATTORNEY AT LAW

IN SUPPORT OF

THE NOMINATION OF JUDGE ANTHONY M. KENNEDY

FOR THE OFFICE OF ASSOCIATE JUSTICE

OF

THE SUPREME COURT OF THE UNITED STATES,

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE.

DECEMBER, 1987

Mr. Chairman: My name is Frank Carrington; I am an Attorney at Law; I reside, and practice, at 4530 Oceanfront, Virginia Beach, Virginia, 23451; office telephone: (804) 422-2692; home telephone (804) 428-1825.

I appear, herein, as a private citizen, to urge that this Committee, and the Senate as a whole, Advise and Consent to the nomination of Judge Anthony M. Kennedy as Associate Justice of the Supreme Court of the United States.

My frame of reference is the record of Judge Kennedy on certain criminal justice issues, with particular emphasis on the rights and needs of the victims of crime in America.

My credentials to speak on these issues can be summarized as follows: I received and Ll.B. degree from the University of Michigan Law School in 1960, and a Master of Laws degree, in Criminal Law, from Northwestern University Law School in 1970.

The first ten years of my career were spent in active law enforcement work on the federal and local levels, the next ten years were spent in work in the private sector in support of professional law enforcement and in support of the rights of the victims of crime; the past seven years have been devoted almost exclusively, through my practice of law, private sector work, and government service, to the rights of victims of crime. Thus, I have been actively involved in the cause of crime victims for the past 17 years.

I have served in the following capacities:

- Member, President Reagan's Task Force on Victims of Crime.
- Member, Attorney General's Task Force on Violent Crime.
- Member, and Vice Chairman, Advisory Board, National Institute of Justice, United States Department of Justice.
- Member, Vice Chairperson and Chairperson, Victims Committee, Criminal Justice Section, American Bar Association.
- Former Member, Board of Directors, National Organization for Victim Assistance.
- Assistant Director for Criminal Justice Policy Coordination, Reagan/Bush Transition Team (1980-81).
- Member, National Law Enforcement Council. (1980-Current).
- Consultant on Victims Issues, National Judicial College, Reno, Nevada (1983).

I have authored, or co-authored, two books on the rights of crime victims; [1] one book documenting the case for capital punishment, [2] and one book on evidence law for the police.[3] I have written four law review articles and a number of articles for professional journals on victims, [4] and criminal justice issues, particularly on the exclusionary rule.[5]

I have spoken, as a guest lecturer on criminal justice and crime victims issues at, inter alia, the University of Michigan Law School, the University of Richmond Law School, the National College of District Attorneys at the University of Houston Law School, Suffolk University Law School and the FBI National Academy at Quantico, Virginia.

I am currently Legal Consultant and Director of the Crime Victims Litigation Project of the Sunny von Bulow National Victim Advocacy Center, Fort Worth, Texas,[6] and Executive Director of the Victims Assistance Legal Organization, Virginia Beach, Virginia.

The plight of crime victims in this country is a constant, pervasive problem that should be addressed at the highest policy-making levels every time that a national issue which is relevant to the rights and needs of victims of crime comes to the fore. The instant proceedings: Hearings on the nomination of Judge Kennedy for confirmation as associate Justice of the Supreme Court, is clearly such an issue.

It belabors the obvious to state that, if we did not have crime, we would not have victims, and, as a consequence, we would not need a criminal justice system. Unfortunately, the converse is true: we do have crime; we do have victims; hence, the record and views of a Supreme Court nominee on criminal justice issues becomes, a fortiori, an issue of major concern to the victims of crime, and to those who represent them.

The current situation of the "victims of crime", which term includes all of us, actual or potential victims, was described in the Final Report of the President's Task Force on Victims of Crime:

> Something insidious has happened in America: crime has made victims of us all. Awareness of the danger affects the way we think, where we live, where we go, what we buy, how we raise our children, and the quality of life as we age. The specter of violent crime and the knowledge that, without warning, any person can be attacked or crippled, robbed, or killed lurks at the fringes of consciousness. Every citizen of this country is more impoverished, less free, more fearful and less safe because of the ever-present threat of the criminal. Rather than altering a system that has proved itself incapable of dealing with crime, society has altered itself.[7]

-4-

Indeed, even Justices of the Supreme Court, to which Judge Kennedy has been nominated, have commented on the victims' perspective in criminal justice issues. Justice Antonin Scalia, writing for himself, Chief Justice Rehnquist, Justice White and Justice O'Connor, in his dissenting opinion in Booth v. Maryland,[8] stated:

> Recent years have seen an outpouring of popular concern for what has come to be known as "victims rights" - a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's guilt, but also the amount of harm he has caused to innocent members of society. (Emphasis supplied.)[9]

Justice Scalia was speaking in the context of criminal sentencing; however, from the perspective of the actual and potential victims of crime, I submit that he could have been speaking about most of the other important criminal justice issues confronting this country today; and the same "outpouring of public concern" would be applicable to all of them.

The foregoing statement by Justice Scalia was in a dissenting opinion. Earlier on, however, in a majority opinion, the Supreme Court stated specifically that: "In the administration of criminal justice, courts may not ignore the concerns of victims."[10]

With all of this in mind, I will address the rest of my testimony to the issue of whether Judge Kennedy, upon being elevated to the Supreme Court, would continue this laudable (and long overdue) concern for the victims of crime. From a reading of the cases in which he wrote the opinion, or participated, while on the United States Court of Appeals for the Ninth Circuit, it is my firm conviction that Judge Kennedy would reflect the same

concerns. Judge Kennedy's opinions on criminal justice issues, which are, of necessity, of primary concern to crime victims, supports this assertion.

I will not engage in a lengthy rehash of all of Judge Kennedy's cases on criminal justice issues; to do so would be redundant. This Committee has studied them, can, and probably will, question Judge Kennedy about such opinions, his judicial philosophy, and so on. Accordingly, I will only note briefly his important cases as they may be perceived from the point of view of the victims of crime.

On issues of primary concern to crime victims, Judge Kennedy has taken a forthright position that a balance must be struck between the rights of victims and the rights of accused and convicted criminals. Such issues include: 1) The Exclusionary Rule[11]; 2) Capital Punishment[12]; 3) Drug Smuggling[13]; 4) Homicide[14]; 5) Organized Pornography[15]; and, 6) Drunk Driving[16].

Mr. Chairman, it is difficult to purport to speak for an amorphous clientele such as victims of crime; however, I am sincerely convinced, based on having represented and consulted with hundreds, if not thousands, of crime victims over the past 17 years, that by far the greatest majority of such victims would enthusiastically endorse the confirmation of Judge Anthony M. Kennedy for the position of Associate Justice of the Supreme Court of the United States.

With thanks for such consideration as the Committee may give to the information contained herein, I am,

Most Respectfully,

Frank Carrington
Attorney and Counselor
at Law

NOTES: Statement of Frank Carrington, Attorney at Law, relative to the confirmation of Judge Anthony M. Kennedy for the office of Associate Justice of the Supreme Court of the United States, before the Committee on the Judiciary, United States Senate, December, 1987

1. See: Rapp, Carrington and Nicholson, School Crime and Violence: Victims' Rights, Mailbu, CA, Pepperdine University (1986); Carrington, The Victims, New Rochelle, NY, Arlington House (1975).

2. See: Carrington, Neither Cruel Nor Unusual: The Case for Capital Punishment, New Rochelle, NY, Arlington House (1978).

3. See: Inbau, Aspen, and Carrington, Evidence Law for the Police, Philadelphia, Chilton Books (1970).

4. See: Carrington and Nicholson, Victims' Rights: An Idea Whose Time Has Come, 11 Pepperdine L. Rev. 1 (1984); Carrington, Victims Rights: A New Tort?-Five Years Later, 19 Trial 50 (1983); Carrington, Death, Deterrence and the Victims of Crime, 35 Vanderbilt L. Rev. 587 (1982); Carrington, Victims' Rights: A New Tort?, 13 Trial 39 (1978); Carrington, Victims' Rights Litigation: A Wave of the Future, 11 U. Rich. L. Rev. 447 (1977).

5. See, e.g. Carrington, Good Faith Mistakes and the Exclusionary Rule, 1 Criminal Justice Ethics 35, (1982); Carrington, Chimel v. California: A Police Response, 45 Notre Dame Lawyer 559 (1970).

6. See: Paul Marcotte, Project to Aid Crime Victims, A.B.A.L.J., September 1, 1987, p.20, col.1.

7. Final Report, President's Task Force on Victims of Crime, The White House, Washington, D.C., December, 1982, p.vi, col.1.

8. __U.S.__,41 Cr.L. 3282 (1987). In Booth the Court held, 5 to 4, that "victim impact statements" by the survivors of homicide victims could not be used during the penalty in the trial of the person accused of the homicide.

9. __U.S.__, at __, 41 Cr.L. 3282, at 3288.

10. Morris v. Slappy, 103 S.Ct. 1610, at 1617 (1983); (emphasis supplied.)

11. United States v. Leon, #82-1093 (9th Cir. Jan. 19, 1981; dissenting opinion, non-pub.); United States v. Peterson, 812 F.2d 486 (9th Cir. 1987).

12. Adamson v. Ricketts, 789 F. 2d 722 (9th Cir. 1986, dissenting opinion); Neuschafer v. Whitley, 812 F. 2d 1390 (9th Cir. 1987).

13. United States v. Allen, 633 F 2d 1373 (9th Cir. 1980).

14. Barker v. Morris, 761 F. 2d 1396 (9th Cir. 1985).

15. United States v. Sherwin, 539 F. 2d (9th Cir. 1976).

16. United States v. Harvey, 711 F. 2d 144 (9th Cir. 1983; dissenting opinion).

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STATEMENT OF OPPOSITION TO THE NOMINATION OF JUDGE KENNEDY

INTRODUCTION

The Center for Constitutional Rights is opposed to the nomination of Judge Anthony Kennedy to the Supreme Court. We believe that a justice of the Supreme Court must affirmatively demonstrate a commitment to civil rights and civil liberties and not merely be "not as bad as Judge Bork." We hope that members of Congress and organizations who opposed Judge Bork insist that the American people have a right to a justice who will truly do justice. Judge Kennedy is not such a nominee.

Judge Kennedy repeatedly rules against constitutional and statutory rights asserted by women, homosexuals, Blacks, Latinos, Indians, aliens and prisoners. His opinions express a strong pro-business, anti-union and anti-employee bias. He favors the death penalty and has watered down the protection against illegal searches and seizures protected by the Fourth Amendment. He has been criticized for ignoring the proper role of an appellate judge and substituting his judgment for that of the trial court in order to reach the result he desires. While he may not have espoused a philosophy as pernicious as that of Judge Bork's, he

reaches similar retrograde results.

In certain areas, such as the First Amendment, he has not expressed unmitigated hostility toward litigants' rights. This is true in selected criminal cases as well. However, these limited exceptions do not overcome a narrow view of civil and constitutional rights which does not guarantee justice for all.

WOMEN'S RIGHTS

Two decisions in the area of women's rights are particularly striking. In AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985) he reversed the trial court and held that a class of 15,000 employees of the State of Washington failed to establish a Title VII sex discrimination claim despite overwhelming evidence that the women employees were receiving lower wages than men for comparable work. This was despite the State's admission that such discrimination had taken place. Judge Kennedy permitted such discrimination because, in his view, it was based upon the free market system and the law of supply and demand. In other words, if discrimination is rooted in the society it is allowable.

Judge Kennedy concurred in a dissenting opinion in Gerdon v. Continental Airlines, 692 F.2d 602 (9th Cir. 1983) applying a similar analysis to a claim by airline flight attendants that strict weight requirements for women and not for men were discriminatory. The

airlines' justification was not safety, but rather that its passengers preferred being served by attractive women. Fortunately, the majority refused to accept this as a legitimate reason and held it discriminatory on its face. However in another decision, White v. Washington Public Power Supply Commission, 692 F.2d 1286 (9th Cir. 1982) he ruled, contrary to other courts, that section 1981 of the Civil Rights Act applied only to discrimination against Blacks and did not protect women. These decisions reflect actions in his personal life. Until a short time ago he belonged to the Olympic Club in San Francisco, a club that permitted no women members. (He resigned because he knew he was being considered for the Supreme Court.)

GAY AND LESBIAN RIGHTS

Judge Kennedy, like Judge Bork, authored an opinion upholding the right of the Navy to discharge personnel who engaged in homosexual conduct. Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) Rather than decide whether such conduct was a fundamental aspect of the right to privacy, he accepted the claim of the Navy that military necessity justified the dismissal of homosexuals. While referring to the Supreme Court decisions protecting privacy and the right to abortion, notably absent was any affirmation that he affirmed or adopted the reasoning of those cases.

In an earlier case, Singer v. U.S. Civil Service

Commission, 530 F.2d 247 (9th Cir. 1976). Judge Kennedy signed on to an opinion which allowed a gay activist to be dismissed from his government job for being, according to the Civil Service Commission, "an advocate for a socially repugnant concept." The Supreme Court vacated the decision saying an employee cannot be summarily discharged without some showing that his or her homosexual conduct is likely to impair the efficiency of the Civil Service. The Singer reversal might well explain Kennedy's toned-down language in Beller v. Middendorf. The result is the same -- mandatory dismissal -- but Kennedy reaches for language about the "special needs of the military" to justify the result.

RACIAL DISCRIMINATION

Decisions in the area of racial discrimination demonstrate that Judge Kennedy has no understanding that laws protecting racial equality are to be broadly and liberally construed. His decision in Topic v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976) denied access to the courts to a fair housing organization and homeowners against a group or realtors involved in racial steering. To reach this result he had to bend previous Supreme Court decisions and reject the reasoning of a number of other courts. Three years later, in an opinion by Justice Powell, the Supreme Court by a 7-2 margin rejected Judge Kennedy's position. In Spangler v.

Pasadena Board of Education, 611 F.2d 1239 (9th Cir. 1979) a school desegregation case, Judge Kennedy concurred in the result by writing a long opinion which disregarded important principles of judicial fact-finding and gave a narrow view of the constitutional right to attend desegregated schools.

VOTING RIGHTS

In what could have been a disaster for voting rights litigation, Judge Kennedy wrote a long concurrence rejecting a challenge to at-large voting by Latinos in California, Aranda v. VanSickle, 600 F.2d 1267 (9th Cir. 1979). His analysis not only set forth a requirement of invidious intent for such challenges to be heard, but determined facts in a manner that allowed him to reach the result he desired. This decision essentially held up voting rights litigation in the 9th Circuit until 1982 when Congress, by legislation, overruled the narrow way in which Judge Kennedy and some other judges had read the Voting Rights Act.

NATIVE AMERICANS

Indians, like other minorities, have not fared well in cases decided by Judge Kennedy. In Oliphant v. Schile, 544 F.2d 1007 (1976), a case challenging the right of an Indian tribe to try non-Indians for offenses committed on the reservation, Judge Kennedy dissented from permitting the tribe such jurisdiction. He labeled the idea that Indian tribes had inherent sovereignty to

try such offenses as novel, and inconsistent with prior practice. In Blackfeet Tribe of Indians v. State of Montana, 729 F.2d 1192 (1984), Judge Kennedy joined a dissent which demonstrated hostility toward the principle that ambiguities in statutes are to be resolved in favor of Indians. This is one of the cardinal principles of Indian law.

IMMIGRATION

While Judge Kennedy claims to understand that neither the Immigration and Naturalization Service nor the Bureau of Indian affairs "inspire confidence", he refuses to do very much about their errors. Villena v. INS, 622 F.2d 1352 (9th Cir. 1980). His position is that review of deportation proceedings should be quite narrow, that the courts should give deference to administrative proceedings and be primarily concerned with rules and procedures and not individual cases.

LABOR

His rulings in the labor area are particularly egregious. His greatest number of dissents are from decisions enforcing union rights. For example, when union members lobbied congress to protect their jobs from foreign competition, a position contrary to that of the company's, he dissented from a decision upholding an unfair labor practice against the company for disciplining the employees. Kaiser Engineers v. National Labor Relations Board, 538 F.2d 1379 (9th Cir. 1976).

PRISONERS

In United States v. Goveia, 704 F.2d 1116 (9th Cir. 1983), Judge Kennedy joined a dissent from a ruling holding that prisoners had a right to counsel when they had been placed in administrative detention when the detention was due to a pending investigation or trial.

ENVIRONMENT

In Libby Rod and Gun Club v. Poteat, 594 F.2d 742 (9th Cir. 1979), the court found that Congress did not authorize the building of a dam which would have caused environmental damage. Judge Kennedy dissented and found that congressional appropriations were sufficient to authorize the dam and that a specific authorizing statute was not necessary. This ruling has implications in other than environmental areas. For example, a

frequent claim by administrations is that congressional funding is the equivalent of a declaration of war under the Constitution. Apparently, Judge Kennedy would agree with this reasoning.

INDIVIDUAL RIGHTS CASES

Judge Kennedy appears to have little compassion for the individual asserting his or her rights and rarely favors "the little guy." He often finds technical grounds for getting rid of such cases.

In EEOC v. Alioto Fish Co., Ltd., 623 F.2d 86 (9th Cir. 1980), he authored an opinion upholding the dismissal of an employment discrimination case because the EEOC did not file its law suit until 62 months after the employee filed her charges against the employer with the EEOC. The fact that the employee had no control over an EEOC office that was being gutted by the Reagan Administration did not prevent her from being penalized because of the EEOC's dereliction of its duties.

In another case, Koucky v. Department of the Navy, 820 F.2d 300 (9th Cir. 1987), the Court of Appeals, again in an opinion authored by Judge Kennedy, threw out a lawsuit against the Department of the Navy by a handicapped former naval employee because the lawsuit named the "Department of the Navy" as a defendant when it should have named the "Secretary of the Navy." Furthermore, the Kennedy court would not allow the claimant to amend his pleadings, deciding instead to

adhere to a rigid thirty day time bar. As a result, the plaintiff was not allowed to litigate his case.

In yet another civil rights case, a Native American woman succeeded in winning a $161,000 award in an employment discrimination case from a trial court. Apparently convinced that the amount awarded was not sufficient to cover compensatory and punitive damages, back pay, and attorney's fees, she appealed to the Court of Appeals. Focusing entirely on the arguments of the employer. Kennedy wrote an opinion for the Court overturning the monetary award and ordering the plaintiff to try her case anew. Thus, in her quest to obtain more justice, the plaintiff was deprived of all justice. See, White v. Washington Public Power Supply System, 792 F.2d 1286 (9th Cir. 1982).

The issue is not whether Judge Kennedy is as bad as Judge Bork. Rather, it is whether we want a Supreme Court and Supreme Court Justice that will build on the civil rights and civil liberties gains of the past years. We at the Center for Constitutional Rights do. We feel that Judge Kennedy will not move us forward; we are fearful he will move us backward.

B18771

Committee for the Preservation of Civil Rights
558 Capp Street
San Francisco, California 94110
415-285-5067

December 11, 1987

Dear Senate Judiciary Committee Member,

The Committee for the Preservation of Civil Rights is an ad hoc group of persons interested in the nomination of a Justice to the U.S. Supreme Court who will uphold the rule of law, respect the development of civil rights that has occurred in recent decades in the U.S. courts, and who will not decide cases with a slant toward any party. The members of this Committee include lawyers, law professors and community leaders who have been active in observing the U.S. Supreme Court confirmation process, and who believe that the Senate Judiciary Committee inquiry into the qualifications of Judge Robert Bork was a precedent-setting and worthwhile process, establishing a baseline for qualifications of U.S. Supreme Court appointees of any President. While the lessons of the Bork rejection should not be oversimplified, we believe that, at a minimum, it established that people in the U.S.A. want Supreme Court Justices who stand forthrightly in favor of the equal protection guarantee for all persons, especially historically oppressed groups such as women and minorities, who view the First Amendment's guarantees of free speech, association and religious exercise generously, and who take a humane and compassionate view of their role in dispensing justice.

We write this letter because we believe that U.S. Supreme Court nominee Anthony Kennedy has some serious questions to answer about civil rights, the rule of law and the role of the courts in its preservation and advancement. We hope and intend that the questions and problems that we raise in this letter will be taken up in the hearings of the Committee as to Judge Kennedy's qualifications for Supreme Court appointment, which we understand are scheduled to commence on Monday, December 14, 1987.

We also note that, although there has been widespread comparing of Judge Kennedy with Judge Bork, and a pervasive effort to short-circuit full inquiry into Judge Kennedy's qualifications because he is "better than Bork", we believe this is a false issue. Judge Bork is no longer in the Supreme Court picture, and the task currently facing the people and elected representatives of this nation is to determine whether Judge Kennedy should sit on the Supreme Court, in his own right and based upon his own qualifications, neither benefited nor prejudiced by the nation's particular experience with the rejected nominee, Robert Bork.

The Committee for the Preservation of Civil Rights believes that Judge Kennedy has a record of judicial decisions, speeches and personal actions that raises serious questions about Judge Kennedy's ideological patterning in making decisions as a judge, his capacity to impartially hear all sides of the cases presented to him, and his real and operative beliefs as to the function of the courts and the meaning of the rule of law in deciding important questions about civil rights. We have prepared this letter to raise some of those questions, and to provide information to those who have inquired about our views of Judge Kennedy as a U.S. Supreme Court nominee, and about our opinion of the process by which his qualifications should be scrutinized by the U.S. Senate.

INTENTIONAL DISCRIMINATION

Judge Kennedy frequently has ruled in favor of allegedly discriminating entities and persons, often reasoning that the discrimination proved was not intentional, or not obvious enough, or not shown to be based in malice; he shows extreme deference to the status quo, where that status quo operates to discriminate against women and minorities. See, for example, his decisions in AFSCME v. Washington, 770 F.2d 1401 (1985) ("Neither law nor logic deems the free market system a suspect enterprise", where the "free" market pays women less than men for work of equal value); Gerdom v. Continental Airlines, 692 F.2d 602 (1982) (in dissent, Kennedy would permit airline to impose female-only personal appearance requirements to satisfy purported "customer preferences"); White v. Washington Public Power Supply System, 692 F.2d 1286 (1982) (Kennedy offered dictum as to the failure of plaintiff American Indian to prove a "policy" of discrimination by employer); Aranda v. Van Sickle, 600 F.2d 1267 (1979) (where voting system results in demonstrable dilution of the value of Mexican-American votes, restructuring it nonetheless would be an "extreme" remedy).

Judge Kennedy was a member of the Olympic Club until October, 1987, when he resigned, in his own words, to "prevent [his]...membership from becoming an issue" in the Supreme Court confirmation process. He wrote in his application for federal judgeship this year that the Olympic club exclusionary practices were not the result of "ill-will", but might cause "real harm" anyway. Judge Kennedy selected 35 law clerks from 1975-1987 to work with him; none were black, Hispanic or Native American, while 1 was Asian, and 5 were females.

The theme of Judge Kennedy's decisions and actions is that discrimination that does not originate from provable malice is somehow less legally actionable and less harmful than the kind of discrimination that wears an ugly face. Judge Kennedy should be searchingly questioned about whether the laws he is interpreting require the sort of malicious motivation he seems to be requiring. Title VII of the Civil Rights Act is supposed to prohibit employment practices that discriminate in effect, as well

as those that discriminate in intent. Griggs v. Duke Power Co. , 401 U.S. 424, 430-432 (1971), a unanimous decision by Chief Justice Burger, established this rule. In his decisions and personal actions about discrimination, is Judge Kennedy following this rule, or applying his own narrower version? Why does Judge Kennedy think "ill will" is important in the policy of the Olympic Club? If the Club's policy was offensive to him, harmful to women and minorities, and possibly unlawful, why did he not resign regardless of his possible Supreme Court appointment?

THE RULE OF LAW AND ACCESS TO THE COURTS

Judge Kennedy has spoken in favor of the idea that the Constitution should be restricted to the intent of its framers, and against the use of courts to resolve "political" questions. (Speech excerpted in NY Times p. 13, 12/1/87.) One outcome of such views is to limit access of "new" (ie. more modern than the founders' ideas and experiences of 200 years ago) claims by oppressed groups. Judge Kennedy himself has written opinions limiting ting such claims. See, for example, his opinions in Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739 (1984)(Kennedy dissents from holding that employee had standing to sue under Clayton Act when discharged and boycotted for refusal to participate in bid rigging scheme; Kennedy would limit standing to consumers or competitors, stating that "the antitrust laws were not intended as a balm for all wrongdoing in the business community"), in Spangler v. Pasadena City Board of Education, 611 F.2d 1239 (1979) (in lengthy concurrence, Kennedy rejected standing of group to complain of school resegregation effort, and found "there has been no showing of noncompliance", 611 F.2d at 1243, omitting thirteen instances of noncompliance that were found by trial court), and in TOPIC v. Circle Realty, 532 F.2d 1273 (1976), rejecting the right of black and white famillies together to go to court to challenge racial discrimination by realtors. It is noted that Judge Kennedy's opinion in TOPIC was severely criticized by Justice Powell and others in Gladstone Realtors v. Village of Bellwood (1979), for its lack of authority and its defiance of Supreme Court decisions.

The fixed rule of appellate review of lower court decisions establishes that a trial court's finding of fact will not be reversed unless clearly erroneous. Yet Judge Kennedy reached out to reverse a judgment in favor of a female police officer who had proved discrimination by a preponderance of evidence below, despite the absence of any clear error; he invited and encouraged the defendant city to prove it would not have hired her anyway. Fadhl v. City of San Francisco, 741 F.2d 1163 (1984). This decision does not harmonize well with the rule of law as to when appellate courts are supposed to reverse trial courts.
Is Judge Kennedy willing to undercut the standing and access to courts of minority groups, in the name of avoiding "political" questions and conforming to "original intent"? Is the rule of law a one-way proposition to him, such that where other courts' rulings displease him he will simply reject them?

FREEDOM OF SPEECH FOR WHOM?

While Judge Kennedy has upheld the First Amendment's guarantees of free speech and free press in several cases, such as his rejection of the blatant effort to ban airing of a TV program containing clearly protected expression, Goldblum v. NBC, 584 F.2d 904 (1978), he has not protected free speech in a number of less traditional or less obvious cases. See, for example, his dissenting opinion in Lynn v. Sheet Metal Workers International Association, 804 F.2d 1472 (1986), where he would have upheld a discharge of a union official whom Kennedy agreed was being "penalize[d]...for his exercise of protected rights", because Kennedy would distinguish penalizing a union official from penalizing a union member, in terms of the danger to "continued democratic governance" of the union of such penalties, and see his opinion upholding a suspension of a public employee for commenting on a matter after being told not to do so by the employer. Kotwica v. City of Tucson, 801 F.2d 1182 (1986).

Such decisions by Judge Kennedy raise the question: For whom will the benefits of the First Amendment flow under Judge Kennedy's interpretation of the Constitution at the Supreme Court level? Does Judge Kennedy fully appreciate the cost to employees of being disciplined and terminated for engaging in free speech?

COMPASSIONATE JUSTICE?

Along with the pattern of rulings against women and racial minorities identified above, Judge Kennedy has ruled consistently against the assertions of right of other severely oppressed minority groups. See, for example, his decisions and votes in gay rights cases: Sullivan v. INS, 772 F.2d 609 (1986)(upholding deportation of gay Australian who proved that he would be outcast and defiled if sent to Australia); Beller v. Middendorf, 632 F.2d 788 (1980)(authorizing Navy to discharge gay and lesbian members per se, without regard to their service records, in part because of military service people who 'despise/detest homosexuality' and resulting hostility toward homosexuality in military service, 632 F. 2d at 811); Singer v. U.S. Civil Service Commission, 530 F.2d 247 (1978), vacated, 429 U.S. 1034 (1977)(Kennedy joined opinion permitting discharge of EEOC employee for being gay and for protected free speech, despite Civil Service Commission rule banning such discharges). The harsh real-life results of these types of decisions for whole classes of human beings are not mitigated by the politeness of Judge Kennedy's language in stripping them of rights.

We expect that some of the most important civil and constitutional rights questions of the next decades may concern the rights of other oppressed groups, such as gay people, disabled people, impoverished people. Along with the survival of affirmative action and procreative choice, Judge Kennedy may well

be called upon to decide, for instances, about the constitutionality of AIDS quarantine, about the legality of municipal transportation systems that provide no access to disabled persons, and about the constitutional implications of sexuallly explicit speech in public school education programs designed to curb child abuse. Is Judge Kennedy going to decide these cases with an ideological slant toward "conservative" views of the minorities involved in such cases, so that historical and continuing discrimination against these groups is immunized against Supreme Court review? What will Judge Kennedy, who has a record of ruling against claimants of discrimination in many cases today, be most likely to do with the civil rights questions of tomorrow?

CONCLUSIONS

In light of the serious questions that Judge Kennedy's record raises, the Committee for the Preservation of Civil Rights recommends as follows:

1. The U.S. Senate Judiciary Committee hearing as to Judge Kennedy's qualifications should be as searching and as open as possible. The high standards for inquiry set in the Bork hearing should not be lowered in favor of a quick appointment of Judge Kennedy to the Supreme Court.

2. The particular questions raised by Judge Kennedy's decisions, such as those articulated in this statement, should be asked by the Senate Judiciary Committee. The people of this nation are entitled to have Judge Kennedy be examined as closely and carefully on his views, and on his apparent ideological slant toward government and against claimants of discrimination, as Judge Bork was examined.

3. Public views of Judge Kennedy's qualifications should be solicited from the millions of persons who have, by their correspondence with the Senate, shown an interest in the filling of this Supreme Court vacancy by a just nominee. Senators should be encouraged to hear from their constituents about this nominee, and the public should be provided with the information and time necessary to make its views known.

From the information currently available, the Committee for the Preservation of Civil Rights has profound reservations about the nomination of Anthony Kennedy to the U.S. Supreme Court. We request and hope that the U.S. Senate Judiciary Committee will take these reservations fully into account, and that it will conduct the sort of meaningful inquiry into the background, qualifications and relevant attitudes of this nominee, Judge Anthony Kennedy, that the people of this nation deserve.

We thank you for listening to our concerns. We join in sending this letter as members of the Committee for the Preservation of Civil Rights.

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December 18, 1987

Senator Joseph Biden
United States Senate
Washington, D.C.

It is an honor and a pleasure to write to you. I appreciate your leadership in the senate and on the judiciary committee. Your dedication and effectiveness is invaluable.

In the present hearings to confirm Judge Kennedy as a Supreme Court Justice a serious question has been raised a sufficient number of times as to become a central issue in the matter. This question raised by witness after witness, and by some of the committee members as well, covers the apparent discrepancy between the Judge's actual record of case findings and his verbal sentiments expressed in his testimony in the current hearings.

This central question is this: with respect to the historically necessary, bitterly fought for, and ultimately agreed upon advances in the elevation, promotion and protection of equal rights of those classes of people, which had been traditionally and institutionally oppressed with prejudice and discrimination, how does Judge Kennedy's present verbal responses of assurance of moderation and sensitivity to the challenges of the committee members, stand up to his record of action as an appelate judge which indicates, at best, imperviousness to such advances, effectively obstructing, retarding or rejecting such critical social gains of the past twenty-five years; gains which not only redresses past injustices, but also, in reality, promotes, in general, social harmony, and thus prevents the otherwise kind of civil strife that we have seen to rip and wound America's society and inherent strength.

Hastily, I add that Judge Kennedy's recaord does indicate awareness, compassion and advocacy when a given case concerned the narrower issue of idividual interests and where there were clear procedural errors and/or violations. But almost every case where there was at issue the interests of a class ofpeople, as in the "San Fernando" case and the cases of the rights of privacy for women, the Judge's finding were obstructive, or at the least impeeding, to those interests and concerns. Witness after witness on both the panels of neutrality and against vis a vis confirmation with often eloquent, moving and persuasive arguments and testimony, raised these crucial points.

Which criteria, the Judge's verbal sentiments or his record of

action, is to be considered having the greater weight in the committee's deliberations as to whether the health, safety and enhancement of our social fabric is to be entrusted to the hands, mind and heart of Judge Kennedy? One of the members of the neutral witness panel commented that one of the great difficulties facing most of us in society is the "encultration" and socialization encountered while growing up in our different social groups and classes. I believe you were impressed by this comment as one of the gems of the entire hearings.

In short, the great concern in the deliberations for confirmation on the part of the committee members and those classes of people (the which being women and "minorties" might well number 150 million, a full three-fifths of our population) is: how will Judge Kennedy perform as an Associate Justice of the Supreme Court and as the swing vote on the Court in these great nationally impactful issues: Will there continue to be the advancement of social harmony and progress or will there be a return to tragic and costly civil strife and enormous pain to countless individuals?

It is clear to me that these are not only questions of law, but of conscience, morality and historic awareness and responsibility; questions of underlying processes of reasoning and behavior. It may be that the committee's efforts can be assisted by the testimony of expertise in "enculturation" and behavioral patterns of individuals, groups and social stuctures in the social interactions. Such testimony make be of valuable contribution to the committee in its considerations of the complicated factors involved in this historic matter.

Briefly, for example, patterns of behavior and reasoning are generally predictable once a person has been enculturated and socialized. These dynamics interact with the person's intrinsic uniqueness during the maturation and formative years. The person's patterns of perception, intellectual processes and reasoning (quite apart form one's quality of intellect), of moral perpective and emotional reactance shape one's ultimate assumptions, general perspectives, awarenesses and limitations of awarenesses and, finally, resultant decisions, actions and behaviors. One's past actions then become predictive of one's present and future actions and tendencies.

Of course, the patterns of individuals and even groups, can be changed and influenced by great events, by serious and consistent education, by crucial positive pressure and influence, by critical existential priorities. President Nixon opened China to the west, President Reagan - Scourge of the Soviet par ecellence, recently signed the IBM with U.S.S.R. and visibly softened his attitude towards its present leader. . But elected officials are vastly more susceptible, and immediately so, to public and world pressure and to the heart-cry of their constituencies. Elected officials have far less time to respond to their own internal compulsions of making their personal mark and contributions to the public record. Thus, elected officials are far more immediately instructed and conditioned by the demands, expectations, sensitivities and expediencies of their respective offices.

Supreme Court Justices, on the other hand, are by design protected and immunized from the political pressures of society, and only over great time and indirectly may such pressures influence justices to varying degrees. Once ensconced, a Justice has life-time tenure, free from constituency demand and obligation. Thus, meaningful change in a Justice's viewpoint and reasoning processes may be affected only indirectly and by subtle influences over slow moving time.

Of course, the interactions between the Justices themselves, over time, can influence such changes. By the same token the patterns of the individual Justices , as in any group, act to reinforce like patterns, giving increased credibility, legitimacy and rigidity to them. The greater number of like "minded" patterns the greater and more entrenched do the patterns of each member becomes. Thus, strong prediction, based on such factors, of general tendency of an individuals's future performance may be made.

As a professional therapist, teacher, workshop and seminar facilitator in just such dynamics of human conduct, reasoning and behavior, over the last sixteen years, with all humility, I submit this testimony, and to both the priviledge and duty to appear before you as a witness before your committee for its deeper questioning and probing. The momentous and pivotal historic matter at hand and the decision thereof which confronts the (fortunately) capable and dedicated members of your committee, require any American with any pertinent expertise to do no less than to offer his/her assistance to the service of the committee.

There can be no minimizing the awesome historic and social responsibility facing, first, the members of the Judiciary Committee, and then all Americans, actually. I am delighted to say that the front line trench, manned by the members of your committee, is in the hands of caring and honorable servants of the people. As one who is passionately in love with the American people and principles (a model to the world) I can do no less than to offer my heart and learning for whatever service and value you may find in them.

Should circumstances prevent any more than offering this letter to the public record, and for your consideration, I must dutifully state that based on all my learning and experience, based on much research and study on the part of multitudinous other behavior and human processes researchers, Judge Kennedy's future performance, on or off, the Supreme Court, will tend strongly to follow the record of his past performance, that is, to favorably advocate when possible, for individual and narrow interests, and to block or retard maintenance and/or progress of the gains in civil and legal rights of women, minorities and of the poor; the just and historically imperative and unavoidable social progress critically necessary for the healthy survival of the fabric and framework of the American society which we all cherish.

Respectfully,

Jack Doner

Jack Doner, M.S., MFCC

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STATEMENT OF

FEDERATION OF WOMEN LAWYERS' JUDICIAL SCREENING PANEL

WOMEN'S LEGAL DEFENSE FUND

EQUAL RIGHTS ADVOCATES

ON THE NOMINATION OF

ANTHONY M. KENNEDY

Committee on the Judiciary
United States Senate

January 25, 1988

This testimony on the nomination of Anthony M. Kennedy is submitted on behalf of the Federation of Women Lawyers' Judicial Screening Panel, a nationwide network of women attorneys and law professors which, since 1979, has been investigating and evaluating nominees to the federal judiciary on the basis of their demonstrated commitment to equal justice; and on behalf of the Women's Legal Defense Fund and Equal Rights Advocates, civil rights organizations engaged in litigation, public education and counseling with the goal of securing equal rights for women. These groups share a deep concern that the federal judiciary, and particularly the Supreme Court, remain as the guarantor of constitutional rights in the struggle for equal justice under law.

With the confirmation hearings of Robert Bork, the Senate Judiciary Committee set an exemplary standard, establishing the Senate as an equal partner in the confirmation of federal judges and giving vitality to the process of fulfilling its constitutional duty to advise and consent. The arduous but intellectually rigorous hearings established beyond any doubt a broad national consensus that the Supreme Court properly plays a vital role in protecting the rights and liberties of all of us, and that any aspiring Justice of the Court must show a commitment to maintaining that special role. It is in that spirit that we submit these comments on the nomination of Anthony M. Kennedy.

Our deep concerns about Judge Kennedy's qualifications for the Supreme Court are centered upon the question of whether he has demonstrated a commitment to equal justice, either in his role as a judge or in other facets of his life. In particular, two distinct aspects of Judge Kennedy's record give rise to our doubts about his commitment to equal justice, and we shall explore each of them briefly.

I. Judge Kennedy's Judicial Record

In his twelve years on the bench, Judge Kennedy has decided numerous cases involving the civil rights of minorities and women. Overwhelmingly, he has rejected their claims -- often blocking access to the court house itself, by denying that they have standing to sue. Of course, there will be times in the careers of federal judges when they are constrained by the law from ruling as their hearts might dictate. However, the consistency with which Judge Kennedy rules against these claims, and the unduly technical grounds on which he does so, must give us pause when scrutinizing his judicial record.

His decisions in the area of sex discrimination in employment seem to fly in the face of well-established Supreme Court precedent. These cases involve "facial" sex discrimination policies, pursuant to which women and men were admittedly treated differently. While the Supreme Court has consistently held that such policies are discriminatory under

Title VII of the 1964 Civil Rights Act, Judge Kennedy does not recognize this. Instead, he seems to go out of his way to find an excuse for the discriminatory policy, or a flaw in the plaintiff's case.

For example, in Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982), the airline imposed a maximum weight requirement for its "flight hostesses," while men with similar duties had no such constraint. The majority of the en banc panel held that the hostesses suspended or terminated because of the weight restriction had obviously suffered unlawful sex discrimination, and the Court granted them summary judgment. Judge Kennedy, however, joined a remarkable dissent, which reasoned that the airline's justification for its facially discriminatory policy -- customer preference for thin and attractive women -- created a disputed issue of fact which required a trial on the merits.

In a similar vein, Judge Kennedy reversed and remanded White v. Washington Public Power Supply System, 692 F.2d 1256 (9th Cir. 1982), where there were admissions that the plaintiff, a Native American woman, was discriminated against in hiring and promotion on the basis of her sex, as well as other strong statistical and factual evidence of bias. Finding that the trial court had incorrectly allocated the burden of proof, Judge Kennedy remanded the case, despite the overwhelming evidence of sex-based discrimination which clearly would have sustained plaintiff's burden, even as corrected.

The opinion totally failed to consider the supervisor's admission that he wanted a man for the job. See also Fadhl v. Police Department, 741 F.2d 1163 (9th Cir. 1984), where the compelling evidence of gender discrimination included statements by Fadhl's superviors that she was "too much like a woman," and "very ladylike," which "may cause problems." Nevertheless, Judge Kennedy reversed and remanded the Title VII judgment and award, ostensibly because of a minor factual error by the trial court. 1/

In perhaps the most famous of Judge Kennedy's sex discrimination opinions, AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), he sounds another theme which seems to pervade his attitude toward civil rights litigation: his self-imposed requirement of discriminatory intent or ill will. AFSCME, the "comparable worth" case, presented an historical pattern of gender-based job segregation and resultant wage discrimination. Nonetheless, Judge Kennedy required, inter alia, a "discriminatory motive" before he would find a Title VII violation. His stringent intent requirement is not grounded in Supreme Court precedent; on the contrary, if it were applied, it would effectively vitiate many landmark Supreme Court cases articulating the

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1/ For an excellent discussion of these and other cases, please see the "Statement of Susan Deller Ross" on behalf of the NOW Legal Defense and Education Fund, dated December 15, 1987.

proper standards for adjudicating sex discrimination claims. This is because classifications which distinguish on the basis of gender are usually enacted for reasons of administrative convenience or the protection of women, rarely out of malice or a desire to stigmatize women.

Even in cases of racial discrimination, where there is no pretense of "benefiting" the injured class, many claims fail to meet Judge Kennedy's intent test. For example, in both Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979), and Spangler v. Pasadena Board of Education, 611 F.2d 1239 (1979), he concurred in the panel's judgment, finding that the defendants did not intend to discriminate. In Aranda, an at-large city council districting plan utilized numerous devices, including the location of polling places in the homes of white voters, which predictably discouraged Hispanics from voting and had produced only three Hispanic electoral victories in over 50 years. In Spangler, recently-elected members of the Pasadena school board, which had been cited for non-complaince with a court-ordered desegregation plan on 13 occasions, expressed their intent to revoke the plan when the court terminated its jurisdiction and thereby allow the school population to reflect the (segregated) residential housing patterns.[2/] Even assuming arguendo that the

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2/ See "Statement of Antonia Hernandez" on behalf of the Mexican American Legal Defense and Educational Fund (December 16, 1987), for a detailed analysis of these cases.

law required a finding of intent to discriminate before granting the claims of civil rights plaintiffs in such cases, the intent was evident from the extensive factual records presented in these cases. However, as stated above, no such requirement is imposed by the law. Judge Kennedy's crabbed view of the remedial scope of the civil rights statutes is deeply troubling to all of us who depend upon the Supreme Court to vindicate the rights of women and minorities.

During his confirmation hearings, Judge Kennedy repeatedly attempted to reassure members of the Judiciary Committee that he would respect Supreme Court precedent on civil rights issues. We submit that his pledge to follow precedent is not enough; Judge Kennedy must commit himself to interpreting the civil rights laws generously. His past record provides little concrete evidence of his inclination to do so.

II. Judge Kennedy's Club Memberships

Perhaps even more revealing of Judge Kennedy's tenuous commitment to equal justice is his longstanding membership, terminated just recently, in several discriminatory private clubs. We say "more revealing" because, while a federal appeals court judge's decisions are to some extent circumscribed by principles of law and precedent, his association with such clubs is a matter of complete freedom of choice. In Judge Kennedy's case, his membership in these clubs and

his acquiescence in their policies are evidence of extreme insensitivity to the rights of women and minorities. Judge Kennedy joined the clubs while still a young man and long before his appointment to the federal bench.[3/] However, he retained his membership in two of them, the Olympic Club and the Del Paso Country Club, until the eve of his nomination to the Supreme Court. Whatever motivated his eleventh-hour resignations, he continued to belong to these organizations during an extended period when controversy swirled around the issue of private clubs.

Most importantly, the rules of the United States Judicial Conference (adopted in 1981) and the American Bar Association's Code of Judicial Conduct (adopted in 1984) made it clear that a federal judge's membership in clubs which invidiously discriminate was inappropriate. Unfortunately, the meaning of the term "invidious discrimination" is not defined in these documents, and its vagueness has been an oft-cited loophole, particularly for those who claim that male-only membership policies are, by definition, not invidious. Judge Kennedy suggested that he subscribed to this view, when, in answer to the Senate Judiciary Committee's questionnaire, he stated that his clubs did not invidiously discriminate because invidious discrimination is "intended

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3/ For a complete chronology of Judge Kennedy's club memberships, please refer to the attached Appendix A.

to impose a stigma" on the excluded group.[4/] (However, he also admitted in the same questionnaire that he was not involved in the decision to limit membership and was therefore not competent to articulate the reasons for it. See pp. 47-49.)

Judge Kennedy's answers to Senator Kennedy's questions at his confirmation hearings cloud the issue further. First, he reiterated the position articulated in his questionnaire: "In my view, none of these clubs practiced invidious discrimination." (Transcript of Proceedings, December 14, 1987, p. 140) However, he subsequently admitted, as to the Sutter Club, where everyone knew that he was a federal judge, "that it was inappropriate for me to belong" (Tr., December 14, p. 142), and he resigned in 1980. Thus, he indicates some sensitivity to the appearance of bias at that time -- but not enough.

In an apparent attempt to justify his continued membership in the Olympic Club, where he was more anonymous, he cited a California "rule" requiring "judges [to] remain in those clubs and attempt to change their policies and resign

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4/ Questionnaire, p. 50. One is reminded of Judge Kennedy's recurrent imposition of an intent requirement on the law in cases of discrimination on the basis of race or sex. This pattern reflects a fundamental misunderstanding of the realities of sex discrimination, in particular, which, more often than not, stems from outmoded notions of chivalry and protectionism rather than hostility or ill-will.

only when it becomes clear that those attempts are unavailing." (Tr., December 14, p. 143) The origins of this "rule" are unclear. The only California rule we have discovered on the subject was promulgated in 1986 and is similar to, though stronger than, the ABA Code of Judicial Conduct in prohibiting such club memberships.[5/] Furthermore, there is no record of Judge Kennedy's "attempts" to change the Olympic Club's policies until August of 1987, twelve years after his appointment to the U.S. Court of Appeals for the Ninth Circuit!

We are somewhat heartened by Judge Kennedy's belated acknowledgment that discrimination can be invidious even without ill-will or hostility:

> [I]t is clear to me that if a discriminatory barrier exists for too long, if it is visible, if it is hurtful, and if it is condoned, that the person who condones it can be charged with invidious discrimination. I would concede that. (Tr., December 15, p. 118)

We fervently hope that Judge Kennedy's words signal a new commitment to sensitivity on his part. However, it must be said that he sat for twelve years, adjudicating -- and usually rejecting -- the claims of American citizens that they had been denied their rights because of sex or race discrimination, while he remained a member of two

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5/ A copy of Canon 2 of the California Code of Judicial Conduct is attached as Appendix B.

organizations practicing flagrant sex and/or race discrimination. Surely we must question whether Judge Kennedy has the requisite understanding of the meaning of discrimination for a Supreme Court Justice.

III. Conclusion

Finally, in reviewing the record of Judge Kennedy and his confirmation hearings, we are struck by just how little we know about his views on many of the great issues of our recent past, issues which are destined to come before the Supreme Court again in the near future. It is not too late to require Judge Kennedy to clarify his views on the law of discrimination, for example, and whether he is indeed committed to equal justice under law. His approach to Roe v. Wade, stated in answer to a question by Senator Heflin (Tr., December 14, p. 211), is even more opaque. Rather than articulating his views on the right to abortion or its basis in the Constitution, he chose instead to focus upon stare decisis, and particularly its limited applicability to constitutional litigation. His response to this legitimate line of inquiry truly raises more questions than it answers.

We are left with serious concerns about Judge Kennedy's commitment to equal justice. Despite all of his recent verbal promises, the long history of his actions speak far louder than his comforting words. Our profound doubts cannot simply be assuaged by more abstractions. We must receive

genuine assurances that Judge Kennedy understands the vital role of the Supreme Court in guaranteeing our civil rights and liberties and that he will vigorously and aggressively enforce our rights under the law. The stakes are too high for the American people to be satisfied with anything less.

APPENDIX A

JUDGE KENNEDY AND PRIVATE CLUBS

1962	Kennedy joins Olympic Club. (Bylaws restrict membership to "white males.")
1963	Kennedy becomes "full member" of Del Paso Country Club (had been a junior member since 1958). Though not a written policy, Del Paso has no black and few women members.
Dec. 10, 1963	Kennedy joins Sutter Club. The club excludes women and has few minority members.
Feb. 23, 1967	Board of Olympic Club unanimously votes to retain "whites only" policy.
Jan., 1968	Olympic Club drops "whites only" language while retaining "males only" language.
March, 1975	Kennedy appointed to the U.S. Court of Appeals for the Ninth Circuit by President Ford.
1978	American Bar Association adopts policy that no ABA functions be held in clubs which exclude women or minorities.
Sept. 11, 1979	Senator Strom Thurmond writes letter to judicial nominee from Sixth Circuit on behalf of Senate Judiciary Committee, stating that " ... it is inadvisable for a nominee ... to belong to a social club that engages in invidious discrimination."
March, 1980	U.S. Judicial Conference adopts principle "that it is inappropriate for a judge to hold membership in an organization which practices invidious discrimination." Subsequently asks ABA Ethics Committee opinion on the matter. (Judge Kennedy was a member of the committee which recommended adoption of this principle by the Judicial Conference.)
Sept., 1980	Kennedy resigns from Sutter Club.
March, 1981	U.S. Judicial Conference passes resolution that the commentary to the Code of Judicial Conduct be amended to state that "it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination."

Spring, 1983	ABA Ethics Committee submits amendment to Canon 2 of Code of Judicial Conduct for vote at August meeting, but subsequently withdraws it. Amendment undergoes revision over ensuing months.
July, 1984	U.S. Supreme Court decides Roberts v. United States Jaycees, holding that the Minnesota Human Rights Law required U.S. Jaycees to admit women members.
August, 1984	ABA Commentary adopted by House of Delegates: It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women, and others, that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors. Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination.
Sept. 15, 1986	With extensive press coverage, California amends its Code of Judicial Conduct, Canon 2 to state: It is inappropriate for a judge to hold membership in an organization, excluding religious organizations, that practices invidious discrimination on the basis of race, sex, religion or national origin.
May 4, 1987	U.S. Supreme Court decides Rotary Club case. Justice Powell writes the opinion for a unanimous Court, holding that the California Public Accommodations Law bars male-only service clubs from excluding women from membership.

June 26, 1987	Amid substantial publicity about Olympic Club's membership policies, San Francisco City Attorney warns club that its policies violate California civil rights laws.
August 7, 1987	Kennedy writes urging Olympic Club to change its male-only policy (alludes to another conversation during prior week on the same subject).
Oct. 7, 1987	Olympic Club membership votes overwhelmingly to keep women out.
Oct. 22, 1987	Judge Kennedy resigns from Del Paso Country Club.
Oct. 23, 1987	Bork defeated in Senate.
Oct. 27, 1987	Kennedy resigns from Olympic Club. Department of Justice asks him to fly to Washington.
Oct. 29, 1987	Ginsburg nominated.
Nov. 2, 1987	San Francisco City Attorney sues Olympic Club for violations of California civil rights statutes.
Nov. 7, 1987	Ginsburg nomination withdrawn.
Nov. 11, 1987	Kennedy nominated.

APPENDIX B

TEXT OF AMENDMENT TO CANON 2
CALIFORNIA CODE OF JUDICIAL CONDUCT

(Adopted September 15, 1986)

"It is inappropriate for a judge to hold membership in any organization, excluding religious organizations, that practices invidious discrimination on the basis of race, sex, religion or national origin."

California Commentary

"Membership in an organization that practices invidious discrimination may give rise to perceptions by minorities, women and others, that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on the history of the organization's selection of members and other relevant factors."

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STATEMENT OF BENJAMIN L. HOOKS, LCCR CHAIRPERSON, AND RALPH G. NEAS, LCCR EXECUTIVE DIRECTOR, REGARDING THE CONFIRMATION HEARINGS OF JUDGE ANTHONY KENNEDY

On the eve of the confirmation hearings of Judge Anthony Kennedy, President Reagan's nominee to the United States Supreme Court, the Leadership Conference on Civil Rights is concerned that the Senate fulfill its constitutionally mandated "advice and consent" role with the same care and thoroughness that marked its consideration of the Administration's first nominee to fill the vacancy created by the resignation of Justice Lewis Powell in June 1987. While the Leadership Conference has not taken a position on Judge Kennedy's nomination, we believe that his record raises concerns that require a close examination of the nominee's judicial philosophy before passing on his fitness to take a lifetime seat on the nation's highest court. In light of the haste in which the Senate Judiciary Committee has moved to hold hearings on this nomination, we are especially concerned that the process not be completed before all the relevant issues have been addressed and all interested parties have had adequate opportunity to have their views heard by the Committee.

The fact that six months have passed since Justice Powell's resignation is not a reason to rush the process, but rather the exact reason to assure that it is thorough. With the departure of a Justice who was universally recognized as the "swing vote" on critical constitutional issues of civil rights and individual liberties, the Supreme Court is closely divided on many constitutional issues of great importance to our society. The potential impact of the person selected to fill this vacancy has been recognized by members of the Senate, Administration officials and the public alike. The impact of the President's third choice will be no less than that of his first or second, and the high standards set in the first confirmation hearings must be met again.

In considering the nominee's judicial philosophy, close scrutiny must be given to his view of precedent and the role played by stare decisis in the deliberations of the Supreme Court. Nothing in Judge Kennedy's Ninth Circuit opinions or his pronouncements outside the court gives any indication of how he views the role of a Supreme Court Justice. Judge Kennedy's judicial philosophy cannot be fully ascertained by studying his cases, numerous as they may be, because as a lower court judge, he is bound to adhere to precedents set by the Supreme Court.

While we have not completed our review of his record, we are troubled by Judge Kennedy's views as expressed in a number of his judicial decisions involving issues of civil rights and women's rights. In cases involving voting rights, access to the courts to challenge housing discrimination, equal educational opportunity, and equal employment opportunity, Judge Kennedy has written or joined in opinions (1) imposing onerous requirements on persons claiming to be the victims of discrimination in order to establish violations of the Constitution or civil rights laws or (2) placing curbs on the remedies needed to redress fully discrimination that had already been established.[1]

Judge Kennedy's restrictive interpretations of rights and remedies in his judicial opinions are reinforced by some of his other public statements, e.g., his response to the Judiciary Committee on the question of his membership in private clubs stating that invidious discrimination may be limited to practices "intended to impose stigma on ... persons." Such a statement raises questions about whether the nominee has an accurate understanding of the history of deep rooted discrimination in this country, its persistent effects and the measures that the Congress and the courts have determined to be necessary to eliminate the vestiges of discrimination and provide opportunity to people who previously have been denied it.

Further, it should be noted that members of the Leadership Conference have concerns about other aspects of the nominee's record, including cases involving the rights of working people and trade unions. All of these issues warrant careful questioning of the nominee by members of the Committee, and answers that are less than complete and candid should not be acceptable.

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1 Cases that are of particular concern to us include Aranda v. Van Sickle, 600 F.2d (9th Cir. 1979); Topic v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976); Spangler v. Pasadena City Bd. of Education, 611 F.2d 1239; APSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1987); Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (en banc).

In addition to our substantive concerns about the nominee's views, the Leadership Conference has previously expressed our dismay with the choice of the hearing date. This is the shortest period between the nomination and start of the hearings for any of this President's nominees. In this short space of time, we have not completed our review of Judge Kennedy's entire record and we doubt whether Senators can feel fully prepared to discuss Judge Kennedy's judicial opinions numbering over 400, his many speeches, and the background of his active law and lobbying practice.

It is still unclear whether Senators have at their disposal all the relevant information with which to prepare for the hearings. In particular, assertions by the Justice Department that there were no communications between Judge Kennedy and the Administration regarding his judicial philosophy on issues or subjects that could come before the Supreme Court lack credibility, especially in light of the open political jockeying that took place before the Ginsburg and Kennedy nominations.

Even if the preparation time were adequate, in the hectic period just before adjournment, competing demands for the time and attention of Senators are likely to prevent at least some of the members of the Committee from giving these hearings their full, careful and sustained attention. For these reasons we call on the Committee not to foreclose the possibility of convening further hearings after the recess as necessary to complete its review and to hear testimony from interested parties.

The hearings held by the Judiciary Committee on the Bork nomination set a standard worthy of emulation in all future Supreme Court nominations. Those hearings helped educate all of us about the rights and responsibilities under our Constitution. They provided an appropriate inquiry into the nominee's belief in the role of the Supreme Court in safeguarding fundamental rights and liberties, without in any way intruding on the independence of the Judiciary. These functions must be served in Judge Kennedy's case as well. Full hearings would inform the Committee, the American public, and, not least, the nominee himself about the matters that underlie the great issues that come before the Court.

In our view the Committee can make an important contribution by continuing to follow the extraordinary high standard of fairness and thoroughness it established in the Bork nomination. It must create a complete record by which the Senate and the American public can decide whether Judge Kennedy has a commitment to equal justice under the law and whether he understands the role of the courts in protecting civil rights and individual liberties. It is on that record that the Leadership Conference must rely to complete our evaluation of the Kennedy nomination.

December 11, 1987

LCCR

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Statement of the Leadership Conference on Civil Rights on the Nomination of Judge Anthony Kennedy to the Supreme Court of the United States

January 21, 1988

The Leadership Conference on Civil Rights (LCCR), a coalition of 185 national organizations representing minorities, labor, women, the major religious groups, disabled persons, and older Americans, files this statement on the nomination of Judge Anthony Kennedy to the Supreme Court for the record of the Senate Judiciary Committee.

The Leadership Conference takes no position on whether the Committee should recommend the Senate consent to the nomination. The LCCR operates through consensus and there is not a consensus on his nomination. However, what is shared is a broad concern about both the Committee's process and the nominee's perceptions in one area. We write briefly, therefore, on these two matters.

1. As set out in a December 11, 1987 Statement of Benjamin L. Hooks, Chairperson, and Ralph G. Neas, Executive Director, the Leadership Conference believes that:

> The hearings held by the Judiciary Committee on the Bork nomination set a standard worthy of emulation in all future Supreme Court nominations. Those hearings helped educate all of us about the rights and responsibilities under our Constitution. They provided an appropriate inquiry into the nominee's belief in the role of the Supreme Court in safeguarding fundamental rights and liberties, without in any way intruding on the independence of the Judiciary. These functions must be served in Judge Kennedy's case as well. Full hearings would inform the Committee, the American public, and, not least, the nominee himself about the matters that underlie the great issues that come before the Court." (Statement, copy attached, p. 3.)

It continues to be our view that the December hearing was ill-timed both in following too soon after the nomination for full preparation and in attempting what is in nature an essentially probing and thoughtful process at a time of maximum distraction, pressure, and fatigue -- the concluding days of a congressional session. Many Committee members manifestly sought to do justice by the task before them. But true discussion and the development of lines of inquiry were victims of the calendar and the clock. Thus, for example, many important questions were put to the nominee in writing, following the hearings. This meant no opportunity for follow-up questions, once the nominee had responded, and this is particularly unfortunate since those responses contained some especially pertinent comments that should have been explored further.

For example, a question from Senator Simon (Q. 10) sought to ascertain the role Judge Kennedy feels "custom and tradition" should play in reviewing sex discrimination cases. In his response, Judge Kennedy said that "custom and tradition could [not] form the basis for legitimate employment criteria if those criteria were used as a pretext to discriminate on the basis of sex." This response raises several questions. The introduction of the notion of "pretext" suggests that under Title VII as in several other areas of the law, Judge Kennedy is wedded to the notion that intent to discriminate must be established before a violation can be found -- a notion that, as the Supreme Court has made clear in Griggs and subsequent cases, has no place in Title VII. Further, the implication of Judge Kennedy's answer is that there are circumstances under which weight requirements for flight attendants, all of whom are women, could be justified as nondiscriminatory and "legitimate," i.e. serving a business necessity. But he does not explain what those circumstances are and it is hard to conceive what they might be. The ability to question the nominee in person on these and other important issues might have yielded answers that would be of material assistance to Senators in voting on his nomination.

Moreover, statements by Chairman Biden and other Senators on the concluding afternoon of the hearing evidencing real concern about the nominee's depth of understanding of the situation of disadvantaged minorities, and women in this country were statements that should have been heard by the nominee and to which his response should have been solicited in a live face-to-face situation -- but that was precluded by the imminent ending of the Session and the Committee's inability to reconvene at the start of the new year. The "advice" component of the Committee's role vis-a-vis nominations entails advice not only to the President but also to the nominee before it as to the Committee members' understanding of the present nature of the society and the nature, scope and flavor of the problems in the society that will inevitably come before the nominee, embodied in the particulars of cases, if he is confirmed.

By way of illustration, many of the reservations held by civil rights organizations about the nominee stem from the crabbed construction that Judge Kennedy has given to civil rights statutes in such cases as TOPIC and Gerdom. One may hope that exposure to the views and questioning of members of the Judiciary Committee has given Judge Kennedy a better

understanding of the broad remedial purposes that Congress seeks to accomplish through these laws.

If more opportunity for dialogue had been provided, Senators might have received greater assurance that Judge Kennedy appreciates the needs that gave rise to the civil rights laws and is prepared to give practical content to his statement that "civil rights statutes should not be interpreted in a grudging, timorous or unrealistic way to defeat congressional intent or to delay remedies necessary to afford full protection of the law to persons deprived of their rights." (Answer to Q. 8 of Senator Simon).

2. As indicated in the earlier statement of Messrs. Hooks and Neas (Statement attached, p. 2), and in the preceding paragraphs of this statement, the Leadership Conference is troubled by views and the constricted approach manifested in Judge Kennedy's opinions in a number of cases involving civil rights and women's rights. We will not unnecessarily add to the record by elaborating on the disturbing aspects of the cases noted in that statement (p. 2, n. 1) which have been discussed extensively in testimony before the Committee by member organizations of the Leadership Conference and others -- cases concerning fair housing litigation, school desegregation, voting rights, and gender discrimination in employment. Rather, we would here simply associate ourselves with the eloquent statement of the President of one of our member organizations, and the Vice Chairperson of the Leadership Conference, Antonia Hernandez of the Mexican American Legal Defense and Education Fund (MALDEF), in her appearance before the Committee. We do not suggest that Judge Kennedy has a purpose to limit the rights and opportunities of minorities or of women. What we fear is that he lacks a full perception of their situation -the world as it looks from the perspective of a woman or of a person of color and as it acts upon them, the impact of barriers they face because they are dark-skinned or otherwise different from the majority, or because they are females seeking to live in equality with males.

The Leadership Conference agrees with Judge Kennedy that the "highest duty of a judge is to use the full extent of his or her power where a minority group or even a single person is being denied the rights and protections of the Constitution." (Answer to Q. 4 of Senator Simon.) For a judge to perform this "highest duty", s/he must have the capacity to understand the situation of someone whose background and circumstances are very different from the judge's own, and this capacity must be unimpeded not only by intentional or active bias, but by "indifference" or "insensitivity" (to use Judge Kennedy's words in response to a question from Senator Levin). Nothing less can assure that a Court whose membership includes Judge Kennedy will continue to perform its essential role of safeguarding fundamental rights and liberties.

McGEORGE SCHOOL OF LAW

UNIVERSITY OF THE PACIFIC 3200 Fifth Avenue, Sacramento, California 95817

December 10, 1987

Members of the Senate Judiciary Committee:

The undersigned, members of the faculty of the McGeorge School of Law, University of the Pacific, enthusiastically endorse the nomination of Judge Anthony M. Kennedy as an Associate Justice of the Supreme Court of the United States.

Judge Kennedy has taught Constitutional Law at the McGeorge School of Law for twenty-two years. During the last twelve years, he has also served as a judge on the United States Court of Appeals for the Ninth Circuit, where he has decided many significant cases involving constitutional issues. His commitment to, love of, and respect for the Constitution is manifest.

We have come to know Judge Kennedy well here at the McGeorge School of Law. He has the intellect, experience, and temperament necessary to make significant contributions to the Supreme Court and to the country.

For these reasons, we support his nomination and hope that the Senate Judiciary Committee will promptly recommend to the full Senate that Judge Kennedy be confirmed as the next Associate Justice of the Supreme Court of the United States.

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JUDGE KENNEDY'S RECORD

The Supreme Court Watch Project's
Analysis of the Judicial Opinions of
Judge Anthony M. Kennedy

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JUDGE KENNEDY'S RECORD

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INTRODUCTION

The record of Supreme Court nominee Anthony M. Kennedy fails to demonstrate a forceful commitment to civil liberties and civil rights. The Nation Institute, a foundation dedicated to protecting constitutional rights, is deeply concerned by certain aspects of Judge Kennedy's record, particularly in the area of discrimination, where his decisions reveal insensitivity to women and minorities.

We have studied Judge Kennedy's decisions in eight areas: (1) employment discrimination; (2) discrimination in education, housing, voting rights and criminal law; (3) the right to privacy; (4) criminal procedure; (5) capital punishment; (6) freedom of speech, freedom of the press, and the Freedom of Information Act; (7) freedom of religion; and (8) prisoners' rights.

The record in each of these areas leaves uncertain Judge Kennedy's willingness to protect constitutional rights and freedoms. While Judge Kennedy at times decides in favor of protecting constitutional rights, he does not do so consistently. Based on our study, Judge Kennedy's record in civil rights and civil liberties appears undistinguished at best.

Judge Kennedy does not bring a comprehensive philosophy to his decision-making, but rather employs a

case-by-case method. In his usually short opinions, he reveals little of his thinking or general approach to the area of law at issue. Perhaps Judge Kennedy writes in this manner because he feels constrained by his role as an appellate judge. As a Supreme Court Justice, however, Judge Kennedy may not feel similarly constrained.

For all these reasons, it is imperative that the Senate Judiciary Committee carefully explore the nominee's judicial philosophy and those cases where he has limited constitutional protections. To this end, a list of suggested questions is annexed to this Introduction.

Depending on what is learned, the Senate may have to decide whether an undistinguished record in the areas of civil liberties and civil rights qualifies a nominee to serve on the Supreme Court, the guardian of those liberties and rights.

A summary of Judge Kennedy's views and highlights of some of his more disturbing decisions in the eight areas studied follows:

A. Employment Discrimination

Judge Kennedy's worst record is in the discrimination area. Judge Kennedy's opinions indicate little

sensitivity to the victims of employment discrimination, and even less understanding of the serious consequences of such discrimination in lost wages, benefits, and opportunities.

Judge Kennedy drastically weakens enforcement of the discrimination laws by unduly narrow interpretations and by denying access to the courts based on overly strict application of procedural rules.

One example: Judge Kennedy joined a dissent that would excuse an employer's gender discrimination based on customers' preferences.[1/] Such a rule would open up a loophole that would eviscerate the discrimination laws. In this case, the dissent stated that airline passengers' perceived preferences for slender stewardesses might permit the airline to impose strict weight requirements on women but not on men. The majority of the court rejected this view.

In addition, Judge Kennedy has considered two issues in the forefront of discrimination law -- comparable worth[2/] and homosexual rights[3/] -- and soundly rejected claims in both areas.

1/ Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (en banc), cert. dismissed, 460 U.S. 1074 (1983).

2/ AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985).

(Continued)

Moreover, Judge Kennedy failed to resign from the exclusive Olympic Club in San Francisco until his name was floated as a Supreme Court nominee. The Club bars membership by women and previously barred non-whites. Judge Kennedy also recently resigned from the Del Paso Country Club of Sacramento, which has no non-white members out of 670 members.

Judge Kennedy retained his membership in the Olympic Club despite a 1984 ABA Code of Judicial Conduct canon stating that it is inappropriate for judges to hold memberships in private clubs that practice invidious discrimination. Judge Kennedy's club membership indicates a lack of understanding for those whose opportunities, in a land of opportunity, are limited by discrimination.

B. Discrimination in Education, Housing, Voting Rights and Criminal Law

Outside the employment context, Judge Kennedy continues to resist rigorous enforcement of the discrimination laws. His record indicates a lack of zeal in remedying the profound inequalities between the races and sexes in our society.

(Continued)

3/ Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 454 U.S. 855 and 452 U.S. 905 (1981).

Judge Kennedy too readily applies very narrow interpretations of procedural rules to deny discrimination claimants access to the courts. In one case, Judge Kennedy denied access to the courts to an organization working to eliminate race discrimination in housing.[4/] The organization sued real estate brokers for racial steering -- directing prospective home buyers only to neighborhoods of their own race. That practice was uncovered by members of the organization posing as home buyers. Judge Kennedy held that the organization had no standing to sue despite their allegations of deprivation "of the important social and professional benefits of living in an integrated community."[5/] This unduly narrow construction of the standing requirements was rejected by the United States Supreme Court in an opinion by Justice Powell.[6/] Hence Judge Kennedy interpreted the discrimination laws more narrowly than Justice Powell who he has been named to replace.

In addition to narrow procedural rulings, Judge Kennedy has exhibited insensitivity to the victims of

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4/ TOPIC v. Circle Realty, 532 F.2d 1273, 1274 (9th Cir.), cert. denied, 429 U.S. 859 (1976).

5/ Id. at 1274.

6/ Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

discrimination when denying relief on the merits of discrimination claims.

For example, Judge Kennedy affirmed a grant of summary judgment against Mexican-Americans who alleged that their city's at-large election system for the city council violated their constitutional right to vote.[7/] The Mexican-Americans claimed: that no polling places were located in the private homes of Mexican-Americans, but were often in homes of white people; that Mexican-American poll watchers were harassed; and that despite Mexican-Americans' comprising over fifty percent of the population, very few Mexican-Americans ever were elected. Despite these allegations, Judge Kennedy's concurrence denied the Mexican-Americans the opportunity to present their complaint at a trial.

In the same case, the lower court had ruled against the Mexican-Americans. Among the insulting statements from the lower court was the conclusion that, "[t]he failure of Mexican-American voters to elect Mexican-American candidates . . . is attributable, largely, to apathy of the Mexican-American voters."[8/] While Judge Kennedy's

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7/ Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980).

8/ Id. at 1273.

concurrence stated that certain of the lower court's conclusions "remain troubling", he affirmed this decision of the lower court.

Indeed, Judge Kennedy has shown little enthusiasm for enforcing the discrimination laws. While he often gives the benefit of the doubt to the person accused of engaging in discrimination, he is not similarly generous to the victims of discrimination. For example, in a school desegregation case, where the school board had previously been found to have practiced intentional race discrimination, Judge Kennedy decided to relinquish court oversight of the schools.[9/] Judge Kennedy accepted the school board's resolution that it would pursue affirmative action, and rejected evidence indicating that the school board would reinstate neighborhood school policies that would worsen segregation.

Judge Kennedy's acceptance of the resolution adopted by the school board previously found liable for intentional discrimination indicates a lack of conviction in enforcing the discrimination laws as a remedy for the discrimination that is entrenched in parts of our society.

9/ Spangler v. Pasadena City Board of Education, 611 F.2d 1239 (9th Cir. 1979).

Moreover, Judge Kennedy refused to depart from gender stereotypes by imposing a harsher sentence for forcible sodomy on a man than for rape of a woman.[10/] Judge Kennedy denied an equal protection challenge to the forcible sodomy sentence. He stated that the two crimes could be distinguished based on "traditions and community values that have prevailed for centuries," without recognizing that the equal protection clause prohibits gender discrimination despite contrary community values.

In all, Judge Kennedy exhibits a lack of commitment to enforcing the discrimination laws. He interprets the laws unduly narrowly, limiting their ability to remedy discrimination.

C. Privacy

Judge Kennedy's view on the right to privacy is difficult to discern.

On the one hand he recognizes a generation of Supreme Court privacy decisions as precedents, including Roe

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10/ United States v. Smith, 574 F.2d 988, (9th Cir.), cert. denied, 439 U.S. 852, (1978).

v. Wade and Griswold v. Connecticut. However, he does not comment on these precedents.[11/]

On the other hand, in the same case in which he cites these Supreme Court precedents, he denied the plaintiffs' privacy claims through a distorted method of reasoning under privacy law. In that case, Judge Kennedy upheld the Navy's discharge of personnel who engaged in homosexual activity. This holding was later supported by the Supreme Court in an unrelated case. But Judge Kennedy's method of reasoning ducked the threshold question of whether there existed a fundamental right to privacy that encompassed homosexual activity. Generally, this would be the first step in any privacy analysis. In Beller, Judge Kennedy relies heavily on the military context of the case. Therefore, whether his refusal to consider the threshold question of a right to privacy portends a negative view of privacy rights is difficult to predict.

Judge Kennedy was similarly cryptic about his views on privacy in a speech he gave at Stanford University in 1986. There, he noted that certain "fundamental rights"

11/ Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 454 U.S. 855 and 452 U.S. 905 (1981).

including privacy "should exist in any just society."[12/] But he also said that not all of these rights are enforceable under the Constitution. Once again, Judge Kennedy simply casts doubt on his willingness to recognize a right to privacy without clearly stating his views.

D. Criminal Procedure

There are serious questions regarding Judge Kennedy's record in criminal procedure. For example, Judge Kennedy has occasionally expanded exceptions to the exclusion rule. This rule excludes from criminal trials illegally obtained evidence. He has generally respected the principles of Miranda that require that a criminal suspect be informed of his constitutional rights but only to strictly enforce the literal warnings that the Supreme Court requires. He has also rejected some meaningful claims based on the double jeopardy rule, the right to counsel, and the right to face one's accusors.

In the searches and seizures area, Judge Kennedy has expanded the Supreme Court's recent decision[13/] that

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12/ Speech by Anthony M. Kennedy to the Canadian Institute for Advanced Legal Studies, The Stanford Lectures, "Unenumerated Rights and the Dictates of Judicial Restraint" (Unpublished, Stanford University, 1986).

13/ United States v. Leon, 468 U.S. 897 (1984).

created a narrow "good faith" exception to the exclusionary rule.[14/] He held that the government may use evidence that it accepted on the representation of a foreign government the evidence was untainted when in fact it had been obtained illegally. He has also expressed frustration with what he terms the "rigidities of the exclusionary rule"[15/] and its "iron logic."[16/] On the other hand, when Judge Kennedy believes the police conduct has been egregious, as in one case where a policeman paid a child $5 to reveal where his parent kept illegal drugs, Judge Kennedy has forcefully argued application of the exclusionary rule.[17/]

Whether Judge Kennedy will continue to carve out exceptions to the exclusionary rule should be asked of him before any confirmation vote.

14/ United States v. Peterson, 812 F.2d 486 (9th Cir. 1987).

15/ United States v. Penn, 647 F.2d 876, 888 (9th Cir.) (en banc) (Kennedy, J., dissenting), cert. denied, 449 U.S. 903 (1980).

16/ Satchell v. Cardwell, 653 F.2d 408, 414 (9th Cir. 1981) (Kennedy, J., concurring), cert. denied, 454 U.S. 1154 (1982).

17/ Penn, 647 F.2d at 888 (Kennedy, J., dissenting).

E. Freedom of Speech, Freedom of the Press and FOIA (The Freedom of Information Act)

In the First Amendment area, including freedom of speech and press, Judge Kennedy has a mixed record. At times he has supported First Amendment freedoms with strong and emotional language. At other times he inexplicably denies First Amendment rights placing undue restrictions on the rights. No overriding philosophy seems to reconcile these conflicting viewpoints.

As an example of the dichotomy, in one case Judge Kennedy upheld the broadcasting on television of a film about a person convicted of securities fraud without prior judicial review.[18/] The convict had argued that the film would jeopardize his release on parole. Judge Kennedy overturned the district court's prior restraint on the film stating: "A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech."[19/]

On the other side, Judge Kennedy joined in an opinion, now vacated by the Supreme Court, upholding the firing of a homosexual for being active in the Seattle Gay Alliance, displaying homosexual advertisements in his auto-

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18/ Goldblum v. National Broadcasting Corp., 584 F.2d 904 (9th Cir. 1978).

19/ Id. at 907.

mobile window and publicly indicating his homosexuality.[20/] Judge Kennedy declined to protect the employee's claimed rights of association and expression.

F. Freedom of Religion

Judge Kennedy has participated in very few cases addressing issues arising under the religion clauses of the First Amendment. In deciding these cases, he has relied heavily on Supreme Court precedents. What he will do if confirmed as a Supreme Court Justice cannot be determined.

G. Prisoners' Rights

Similarly, Judge Kennedy has decided few cases involving prisoners' rights. He has supported prisoners' claims when presented with facts clearly indicating official misconduct, but appears unwilling to expand legal doctrines to allow prisoners greater rights than those previously established.

* * *

We have highlighted some of the more troubling aspects of Judge Kennedy's record. While we have deep con-

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20/ Singer v. United States Civil Service Commission, 429 F.2d 247, vacated at request of Solicitor General, 429 U.S. 1034 (1976).

cerns about his opinions in several areas, particularly discrimination, in many ways he is still a question mark. For this reason, it is particularly important that the Senate take the opportunity of the hearings to carefully question Judge Kennedy.

Suggested questions follow.

Twenty Questions the Senate Should Ask

Discrimination in Employment

1. Do customers' gender preferences excuse employment discrimination?

In Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982) (en banc), cert. dismissed, 460 U.S. 1074 (1983), Judge Kennedy joined a dissent stating that airline passengers' perceived preferences for slender flight attendants might permit the airline to impose strict weight requirements on women but not on men. A majority of the Ninth Circuit rejected this view.

2. Under what circumstances, if ever, is affirmative action, including hiring goals, a proper remedy for discrimination in employment?

3. Are the courts powerless to remedy wage disparities between men and women in government jobs requiring comparable education, skills, and effort?

In AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), Judge Kennedy denied relief to women employees with low wages compared to men, based on both the controversial comparable worth theory and traditional disparate impact analysis.

Discrimination in Housing

4. Should access to the courts be granted freely to those with complaints of discrimination?

In TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir.), cert. denied, 429 U.S. 859 (1976), Judge Kennedy decided that investigators who uncovered real estate brokers engaging in racial steering practices -- steering prospective home buyers to communities of their own race -- did not have standing to sue. This narrow interpretation was expressly rejected by the Supreme Court in another case in an opinion written by Justice Powell. See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

Discrimination by Private Clubs

5. Why did Judge Kennedy resign from the Olympic Club in San Francisco, which bars women and which previously barred blacks, only after his name was floated as a possible Supreme Court nominee?

The ABA Code of Judicial Conduct, Canon 2 commentary (1984) states that it is inappropriate for a judge to belong to a private club that practices invidious discrimination. Does Judge Kennedy think that the Olympic Club practices invidious discrimination?

Discrimination in Education

6. When racially segregated neighborhood schools are caused by racially segregated neighborhoods, are the courts powerless to intervene?

In Spangler v. Pasadena City Board of Education, 611 F.2d 1239 (9th Cir. 1979), Judge Kennedy concurred in the termination of court supervision of a school board that had been found liable for intentional race discrimination. Judge Kennedy said that neutral school assignment systems in already racially segregated neighborhoods may not represent illegal discrimination by the school board.

7. Under what circumstances, if ever, is school busing a proper remedy for racially segregated schools?

Discrimination in Criminal Law

8. Is the crime of rape of a woman less reprehensible than the crime of forcible sodomy of a man?

In United States v. Smith, 574 F.2d 988 (9th Cir.), cert. denied sub nom. Williams v. United States, 439 U.S. 852 (1978), Judge Kennedy stated that a harsher sentence could be imposed for forcible sodomy than for rape based on traditions and community attitudes. He found no equal protection violation for the different sentences.

Right of Privacy

9. Is there a constitutional right of privacy that protects marriage, contraception, and procreation? What are the boundaries of any such right?

In a 1986 speech titled "Unenumerated Rights and the Dictates of Judicial Restraint," Judge Kennedy noted that certain "fundamental rights" such as privacy "should exist in any just society," but he said that not all of these rights are enforceable. What does this mean for privacy rights?

Criminal Law

10. Should the exclusionary rule, that excludes from criminal trials evidence obtained through police misconduct, be limited further?

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court created an exception to the exclusionary rule when police officers relied in good faith on a facially deficient warrant. In United States v. Peterson, 812 F.2d 486 (9th Cir. 1987), a case that had nothing to do with a deficient warrant, Judge Kennedy expanded the "good faith" exception to include situations where American officials incorrectly relied on the assertion by foreign officials that their overseas search was not illegal. How broadly does Judge Kennedy interpret the "good faith" exception? In what

additional circumstances other than a facially deficient warrant would he apply this exception?

11. Does Judge Kennedy agree with the Supreme Court's pronouncements that because death is different in its severity and finality from all other sentences, the imposition of capital punishment must be attended by procedural safeguards that might not be guaranteed by the Constitution in other contexts?

12. Should the police ever be required to supply additions to the standard Miranda warnings if a suspect's special circumstances suggest he may unknowingly waive his constitutional rights?

In United States v. Contreras, 755 F.2d 733 (9th Cir.), cert. denied, 476 U.S. 832 (1985), Judge Kennedy affirmed convictions of defendants who mistakenly thought their statements were taken under a grant of immunity.

13. What sorts of errors by criminal defense counsel suggest that he is providing less than the constitutionally required "effective assistance" of counsel?

In United States v. Medina-Verdugo, 637 F.2d 649 (9th Cir. 1980), Judge Kennedy held that "counsel need not be infallible" but only reasonably competent.

14. Should an appellate judge defer in all circumstances to a trial court's determination of effective assistance of counsel?

Judge Kennedy suggested extreme deference in Satchell v. Cardwell, 653 F.2d 408, 414 (9th Cir. 1981) (Kennedy, J., concurring), cert. denied, 454 U.S. 1154 (1982).

Freedom of Speech and Association

15. To what extent do government workers have First Amendment rights?

In Singer v. United States Civil Service Commission, 530 F.2d 247 (9th Cir. 1976), vacated, 429 U.S. 1034 (1977), Judge Kennedy joined in an opinion, later vacated by the Supreme Court, supporting the termination of a government employee for publicly asserting his homosexuality. The employee was active in the Seattle Gay Alliance, had displayed homosexual advertisements in his automobile, and publicly announced his homosexuality.

Judicial Philosophy

16. To what extent should the courts, in interpreting the Constitution, move beyond the framers' initial conceptions of its provisions to a more flexible reading of the ideals and goals it expresses? How does Judge Kennedy's philosophy in this area affect the resolution of issues faced by the Supreme Court that were beyond the contemplations of the framers?

17. To what extent should principles of federalism affect the abilities of civil rights litigants to seek redress in the federal courts?

Judge Kennedy has often advocated judicial restraint and vigorous assertion of various principles of federalism, such as abstention, that require that federal courts not hear cases in which state courts are already involved. For example, in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987), Judge Kennedy, in a concurrence, stated that federal courts should not hear this First Amendment challenge that was also litigated as a zoning dispute in the state courts. In this case, the owner of a dance club challenged zoning requirements and other state laws that would have restricted his club.

18. Does the nominee believe it would be constitutional, as some have proposed, to limit the jurisdiction of Article III courts to eliminate cases involving sexual and racial discrimination, habeus corpus, prisoner civil rights complaints, social security cases, and environmental cases with only limited possibility of review?

Religion

19. Is a short morning prayer conducted in public elementary schools constitutional?

20. To what extent must employers and unions modify their rules and methods to accommodate an employee's religious practices?

Judge Kennedy's opinion in International Association of Machinists & Aerospace Workers v. Boeing Co., Nos. 86-4345, 86-4373 (9th Cir. Nov. 27, 1987) (available Dec. 2, 1987 on LEXIS, Genfed library, Usapp file), upheld a worker's objection to paying union dues on religious grounds.

ANALYSIS OF THE RECORD

I

EMPLOYMENT DISCRIMINATION

Introduction

Judge Kennedy's judicial record on employment discrimination raises serious questions about his sensitivity toward the victims of discrimination. His opinions indicate little understanding of the serious damage done by employment discrimination -- in lost wages, lost benefits and lost opportunities. While he occasionally rules in favor of plaintiffs in employment discrimination matters, this is not generally the case.

Judge Kennedy has not developed a coherent overall philosophy regarding the employment discrimination laws, but his case-by-case approach leans toward restricting their application. Judge Kennedy's decisions have often failed to support employment discrimination claims based on unduly narrow interpretations of the laws or overly technical readings of the procedural rules.

In addition to denying discrimination claims based on unduly narrow or technical readings of the discrimination laws, when presented with a claim that requests expanding current discrimination theory, Judge Kennedy invariably denies the claim. Judge Kennedy has ruled in at least two

areas in the forefront of employment discrimination theory: comparable worth and homosexual rights. In each of these areas, he refused to extend the reach of current discrimination laws.

A. Sex and Race Discrimination in Employment

Analysis of Judge Kennedy's judicial record in employment discrimination cases shows that he frequently denies discrimination claims based on unduly restrictive interpretations or on technicalities, and that when he reaches the merits of a claim he generally rules against the plaintiff, as follows:

In Gerdom v. Continental Airlines, Inc.,[1/] a group of female flight attendants sued the airline over a policy requiring strict weight limits for female "flight hostesses," but not for male "directors of passenger service" with similar duties. The airline's policy required women who were 5 feet 2 inches tall to weigh no more than 114 pounds; an additional five pounds were permitted for each inch above that height. The flight attendants were weighed monthly, and any excess weight had to be reduced by two pounds weekly.

1/ 692 F.2d 602 (9th Cir. 1982) (en banc), cert. dismissed, 460 U.S. 1074 (1983).

Failure to lose the requisite weight resulted in suspension, and then termination.

Judge Kennedy joined a dissent from the Ninth Circuit en banc decision holding that the airline policy was illegal sex discrimination. The court in reversing summary judgment noted that the "exclusively female classification in this case typifies the then prevailing pattern [in the 1970's] in the airline industry of restricting job opportunities and imposing special conditions on the basis of gender stereotypes."[2/] The court found that the airline's sole reason for imposing the weight restriction exclusively on the female job category was to cater to a perceived public preference for slender women. The airline never claimed that its weight policy impaired the functions of flight attendants regarding flight safety or food service. The court, following well-established law, held that customer preferences unrelated to ability to perform the job does not justify gender discrimination.[3/] Judge Kennedy joined in a dissent that disagreed, and would have remanded for a trial on the merits, stating, "the degree of customer contact with flight

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2/ Id. at 606.

3/ Id. at 604, 609.

hostesses dictated that they maintain a more attractive appearance."[4/]

The dissent's view that customer preferences can legitimize gender discrimination not only contradicted contemporary law,[5/] but would have created a loophole in the employment discrimination laws that would have eviscerated those laws. Allowing an employer to rely on customers' gender preferences, might permit employers to hire exclusively female flight attendants, secretaries, and nurses, and exclusively male pilots, doctors, and chauffeurs, with impunity. Such hiring based on gender, as opposed to individual abilities, was precisely the sort of discrimination our laws were intended to wipe out.

Further, the Gerdom decision is a good example of the integral role the courts can and should play in changing past patterns of employment discrimination. Before Gerdom, in 1971, the Fifth Circuit held that the exclusive hiring of women as flight attendants was a discriminatory employment practice.[6/] In 1973, the year following the commencement of

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4/ Id. at 614.

5/ Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

6/ Id. at 388-89.

the action in Gerdom, Continental began hiring men as well as women as flight attendants. At that time, the strict weight requirement at issue in Gerdom was abolished and replaced by a direction that weight be maintained in some "reasonable" correlation to height for both male and female flight attendants. In 1977 Continental abolished the weight requirements entirely.

Judge Kennedy failed to participate constructively as the courts worked to end the employment discrimination that was deeply entrenched in the airline industry.

Judge Kennedy's dissenting vote in Gerdom shows his willingness to accept requirements imposed on women's occupations which are unthinkable in similar male fields.

Judge Kennedy's sympathies are no greater for a lone woman attempting to break into a traditionally male occupation. Nancy Fadhl brought a Title VII sex discrimination suit when she was terminated nine weeks into her required fourteen week field training program to become a police officer. Fadhl v. City and County of San Francisco.[7/] The district court ruled in favor of Fadhl awarding her over $80,000 in damages. Judge Kennedy's review of the evidence recognized a substantial record from which discriminatory

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7/ 741 F.2d 1163 (9th Cir. 1984).

treatment could be found, including specific sexist comments and "numerical scores given to Fadhl on her daily reports [that] were lower than scores given to men whose performance was similar or worse, and that her scores at times did not correspond to the written scoring guidelines." Nonetheless, Judge Kennedy remanded the case to the district court because the district court erroneously found that Fadhl had not attended her termination hearing -- even though Judge Kennedy noted that he was "uncertain" whether this error would affect the district court's ruling.

On remand, the district court simply deleted any mention of Fadhl's presence at the hearing, and on the second appeal to a new panel of the Ninth Circuit not including Judge Kennedy, the panel affirmed the district court.[8/] While Judge Kennedy has a reputation of "sticking to the facts," here he appeared to invent a factual problem that the court below did not see as significant and then used it to disregard otherwise overwhelming evidence of deliberate discrimination.

Judge Kennedy also remanded another Title VII disparate treatment case, this one involving a Native American woman who was awarded over $60,000 in damages for

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8/ 804 F.2d 1097 (9th Cir. 1986) (per curiam).

discrimination in job promotions and harassment based on her race and sex. In White v. Washington Public Power Supply System,[9/] Judge Kennedy wrote an opinion remanding the action and ordering a new trial in part because the district court's findings of fact and conclusions of law required too high a burden of proof from the defendants in their rebuttal case, although the district court's oral decision applied the correct burden of proof.[10/] While this holding could have been dispositive, Judge Kennedy also relied in part on his view of the weakness of plaintiff's factual case. As he wrote, "[t]he trial court's finding of discrimination was tainted not only by the application of the incorrect burden of proof, but also by the use of dubious factual premises."[11/]

Judge Kennedy stepped beyond the proper role of an appellate court by indicating his view of the facts, particularly his view of the lack of credibility of White's expert witness based solely on this expert having once complained to the Equal Employment Opportunity Commission over alleged discriminatory treatment when rejected for a job by WPPSS.

9/ 692 F.2d 1286 (9th Cir. 1982).

10/ Id. at 1289 n.1.

11/ Id. at 1289.

The weight to be given factual evidence, and in particular the credibility of witnesses, are issues traditionally within the province of the trial court. By commenting on the facts in this way, Judge Kennedy usurped the trial court's prerogative.

Further, Judge Kennedy's doubt regarding the factual basis of White's case, along with an error in a legal technicality, led him to remand the action. Here again, as in Fadhl, Judge Kennedy stretched to find a reason to believe that the employer did not discriminate.

In addition, White is noteworthy because Judge Kennedy goes on to comment on his view of the proper application of various discrimination laws on remand. Among other views, he writes that section 1981[12/] prohibits only race discrimination, not sex discrimination. This narrow interpretation of section 1981 has been rejected by at least one other court.[13/]

12/ 42 U.S.C. § 1981 (1982).

13/ Parmer v. National Cash Register, 346 F. Supp. 1043 (S.D. Ohio 1972), aff'd, 503 F.2d 275 (6th Cir. 1974); see also, Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1974).

In Laborde v. Regents of University of California,[14/] Judge Kennedy joined a majority opinion affirming the dismissal of a discrimination claim in which the defendant was not held to such an exacting standard as the plaintiffs in White and Fadhl. Alice Laborde, a tenured assistant professor of French and Italian at the University of California at Irvine, was denied a promotion to full professorship on the ground of "inadequate scholarship."[15/] The panel denied her claim of discrimination despite recognizing her impressive number of scholarly publications as well as the "many favorable comments" in her academic file. The panel also noted that Laborde made out a prima facie showing of discriminatory treatment, including showing that "men with similar qualifications have been promoted to full professor."[16/] Nonetheless, the majority failed to find an error necessary for reversal.

Judge Ferguson of the Ninth Circuit, dissenting from a denial of an en banc vote, lambasted the panel for failing to find discrimination:

14/ 686 F.2d 715 (9th Cir. 1982), cert. denied, 459 U.S. 1173 (1983).

15/ Id. at 717.

16/ Id.

> The panel presents the strongest case possible that Alice Laborde is the victim of invidious sex discrimination.
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> The opinion states in clear language that men with qualifications similar to hers have been promoted to full professor positions.
>
> Yet the opinion concludes that she is not entitled to promotion because she failed to meet the University's standards for scholarship and research.
>
> The logical conclusion of that analysis is that men who do not meet the standards of scholarship and research will be promoted but women will not unless they meet the standards. Title VII prohibits that type of discrimination.[17/]

Judge Kennedy also joined in the majority in Sengupta v. Morrison-Knudsen Co.[18/] that rejected a claim of race discrimination under a Title VII disparate impact theory. Sengupta had worked as a senior engineer on a shale oil project in a 28-person department of large company. Adverse economic conditions forced the company to lay off a number of workers. Of the 5 employees laid off in Sengupta's unit, 4 were black.

The Sengupta court held, affirming a grant of summary judgment, that the appropriate group to use for statistically proving a prima facie case of discrimination was not plaintiff's 28-member department but rather all

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17/ Id. at 720.

18/ 804 F.2d 1072 (9th Cir. 1986).

281 employees in this division of the company. This holding precluded Sengupta from requiring defendant to proffer business reasons for the discrimination and from the opportunity to rebut those reasons. A more generous interpretation of the discrimination laws might have led to a different result in this case. While 28 workers is a small group, 4 out of 5 lay-offs of blacks is a suspiciously high enough proportion perhaps to warrant requiring the employer to offer a neutral explanation for this apparently discriminating act.

In several discrimination cases where the issue was whether complaints were timely filed in the district court, Judge Kennedy has ruled against the plaintiff. Koucky v. Department of the Navy[19/] (handicapped former federal employee, required to file complaint within 30 days of receipt of negative EEOC decision and name head of agency in suit, had suit dismissed because he filed 5 days after deadline); Equal Employment Opportunity Commission v. Alioto Fish Co.[20/] (dismissing case despite a finding of a pattern of continuous discrimination in restaurant, because defendant was prejudiced due to 62-month lapse between time complaint filed with EEOC and when EEOC filed complaint in district

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19/ 820 F.2d 300 (9th Cir. 1987).

20/ 623 F.2d 86 (9th Cir. 1980).

court); Revis v. Laird[21/] (no retroactive application of 1972 congressional amendments extending Title VII administrative and judicial remedies to federal employees). But see Lynn v. Western Gillette, Inc.[22/] (ninety day period to file Title VII complaint in federal court begins to run from day of receipt of Right to Sue letter, not from earlier date when EEOC informally tells party that conciliation efforts with employer have failed). Again, these cases seem to show a pattern of using technical legal devices to lessen the availability and enforceability of the discrimination laws.

Judge Kennedy affirmed a district court judgment holding that an employer who takes over a company may be required to abide by the terms of a consent decree entered into to correct racial discrimination by the previous employer.[23/] It should be noted, however, that the successorship doctrine is well-established in the labor law context.[24/] Without such a requirement, an employer would be

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21/ 627 F.2d 982 (9th Cir. 1980) (Judge Kennedy joined the opinion of Judge Sneed).

22/ 564 F.2d 1282 (9th Cir. 1977).

23/ Bates v. Pacific Maritime Association, 744 F.2d 705 (9th Cir. 1984).

24/ Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973); NLRB v. Hot Bagels and Donuts of Staten Island, Inc., (Continued)

able to avoid the consequences of an adverse legal finding of discrimination or a consent decree by simply selling the company.

The lack of concern for people subjected to race and sex discrimination displayed in Judge Kennedy's decisions is mirrored in his extrajudicial life. Right before his nomination to the Supreme Court, Judge Kennedy resigned from two clubs with histories of excluding blacks and women. Judge Kennedy joined The Olympic Club of San Francisco when its bylaws permitted membership to "only white male citizens." The Olympic Club dropped the whites-only rule in 1968, but no women or blacks are among the more than 4,000 current members. Judge Kennedy also resigned from the Del Paso Country Club of Sacramento. Of the 670 members, none is black.25/

The Commentary to Canon 2 of the American Bar Association Code of Judicial Conduct states:

> It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to

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(Continued)
622 F.2d 1113 (2d Cir. 1980); NLRB v. Winco Petroleum Co., 668 F.2d 973 (8th Cir. 1982); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974).

25/ Legal Times, Nov. 16, 1987, at 11.

> perceptions by minorities, women, and others, that the judge's impartiality is impaired.[26/]

Judge Kennedy appears to have been in violation of this tenet of judicial ethics until just before his nomination to the Supreme Court.

B. New Theories of Employment Discrimination Law

Judge Kennedy seems unwilling to extend the reach of current employment discrimination laws to embrace new doctrines. Judge Kennedy has ruled in at least two areas on the forefront of employment discrimination law -- comparable worth and homosexual rights -- and in each of these areas he has denied the plaintiffs' claims.

1. Comparable Worth

Judge Kennedy has decided one landmark Title VII case, American Federation of State, County & Municipal Employees ("AFSCME") v. State of Washington.[27/] In AFSCME, the first case before any Court of Appeals based on the doctrine of comparable worth, Judge Kennedy, writing for a unanimous panel of the Ninth Circuit, rejected application of

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26/ Code of Judicial Conduct Canon 2 commentary (1984).

27/ 770 F.2d 1401 (9th Cir. 1985).

the doctrine in that case but held out the possibility that it might apply in another situation. The comparable worth theory rejected by Judge Kennedy holds that government jobs requiring comparable education, skill, and effort should pay the same. This theory is an attempt to remedy the low pay that many women in traditionally female occupations receive compared to men in less skilled occupations.

In AFSCME, a class of 15,500 state employees of the State of Washington working in job categories composed of at least 70% female workers alleged sex discrimination in salaries and sought injunctive and monetary relief dating back to 1979. Plaintiffs sought relief under the theory of comparable worth, arguing that jobs "impos[ing] similar responsibilities, judgments, knowledge, skills, and working conditions" should pay similar salaries.28/

Based on reports done for the State of Washington in 1974 and updated in 1975, 1976, and 1980, it was found that there was "an average salary difference of 20 percent, favoring men over women for work of similar complexity and value. . . . The update revealed that since salary increases have been established on a percentage basis, the inequality

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28/ 578 F. Supp. 846, 862 (W.D. Wash. 1983).

gap between men's and women's salaries for similar work has now increased."[29/]

Faced with the overwhelming disparity between the salaries earned by women and those earned by men in comparable jobs, the district court noted the national interest in eliminating employment discrimination.[30/] The district court focused on the "broad remedial policy behind Title VII," quoting the Supreme Court:

> "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. S. Rep. No. 867, 88th Cong., 2d Sess., 12 (1964). We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear Congressional mandate."[31/]

Accordingly, the district court found that the wide disparity in salaries between jobs with similar skills was discriminatory and a violation of Title VII. Judge Kennedy, writing for the panel on appeal, reversed, for reasons that show the narrow view he takes of the role of discrimination laws.

29/ Id. at 862 (quoting Governor Dixy Lee Ray's Message to the Legislature, January 15, 1980).

30/ Id. at 863.

31/ Id. at 856, quoting County of Washington v. Gunther, 452 U.S. 161, 178 (1981).

Comparable worth is an admittedly new theory in search of an elusive, but noble, goal -- correcting the massive economic disparity that has historically existed, and currently exists, between women and men in this country. Not once in his review of the district court decision does Judge Kennedy acknowledge that the ambitious reach of the comparable worth theory is aimed at mending and changing an enormous economic, and ultimately social and political, imbalance.

Significantly, Judge Kennedy stated that "Title VII does not obligate [the Washington legislature] to eliminate an economic equality that it did not create."[32/] But Title VII was promulgated to fight the effects of prior discrimination, woven into and out of the fabric of our society, that most of us were not responsible for creating. Title VII is not concerned only with the creation of discriminatory inequalities, as Judge Kennedy seems to claim, but with their perpetuation as well. It is ambitious because it needs to be.

Instead of analyzing the legal sufficiency of the record before him, Judge Kennedy simply asserted that the entire market system is on trial and that "a compensation

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32/ AFSCME, 770 F.2d at 1407.

system, the result of a complex of market forces, does not constitute a single practice that suffices to support a claim under disparate impact theory."[33/]

Moreover, Judge Kennedy gave short shrift to possible application of a more traditional and accepted discrimination doctrine -- disparate impact analysis. While it is debatable whether comparable worth in a Title VII case is an appropriate legal theory for remedying past discrimination, it is wrong to assert, as Judge Kennedy does about the discriminatory patterns of economic inequality suffered by plaintiffs in AFSCME, that "[t]he instant case does not involve an employment practice that yields to disparate impact analysis."[34/]

The courts have instituted a three-tiered test to prove disparate impact cases under Title VII. First, plaintiff must show that a facially neutral employment practice has a substantial discriminatory effect upon a protected class. Then, the employer may rebut by showing that the discriminatory practice is justified by a legitimate business necessity. Finally, the plaintiff must show that the reason offered is merely a pretext for discrimination. Discrimina-

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33/ Id.

34/ Id.

tory intent need not be proven directly as part of plaintiff's prima facie case.[35/]

Notwithstanding the large class of plaintiffs in AFSCME and the wide-ranging alleged discrimination, Judge Kennedy could have applied traditional disparate impact analysis under Title VII to the facts of AFSCME even without opening the door to the broader questions potentially posed by comparable worth theories. The plaintiffs undertook extensive factual investigations and offered these to the court to prove the first prong of their case. The district court found that the State of Washington "failed to produce credible, admissible evidence demonstrating a legitimate and overriding business justification."[36/]

While in other cases Judge Kennedy pored over the factual record to find minor questions tending to show the absence of discrimination, here he simply rejects the factual record and again finds no discrimination.

2. Homosexual Rights

In another area in which proponents are recently attempting to expand the scope of the discrimination laws --

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35/ See, e.g., Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

36/ AFSCME, 578 F. Supp. at 863.

homosexual rights -- Judge Kennedy has opted for a more restrictive approach.

In Beller v. Middendorf,[37] Judge Kennedy faced Navy regulations prohibiting homosexual acts. Plaintiffs, with otherwise untarnished performance records, admitted engaging in private homosexual activity and were discharged from the Navy. They brought suit alleging due process violations.[38]

Judge Kennedy concluded that substantive due process analysis (i.e., privacy analysis), and not equal protection analysis, was appropriate because the appeals were not presented as implicating a suspect class but rather as implicating an aspect of the fundamental right to privacy. However, he grafted onto this privacy analysis elements traditionally considered part of equal protection analysis, stating that this case fell somewhere between the compelling state interest test and the rational relationship test of equal protection law.[39] He conceded that some kinds of consensual homosexual behavior might face "substantial

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37/ 632 F.2d 788 (9th Cir. 1980), cert. denied sub nom. Miller v. Weinberger, 454 U.S. 855 (1981) and Beller v. Lehman, 452 U.S. 905 (1981).

38/ 632 F.2d at 792.

39/ Id. at 807-08.

constitutional challenge." However, Judge Kennedy concluded that deference accorded the military outweighed whatever heightened solicitude was appropriate for consensual private homosexual conduct.[40/] Judge Kennedy upheld as sufficient governmental interests the Navy's concerns

> about tensions between known homosexuals and other members who "despise/detest homosexuality"; undue influence in various contexts caused by an emotional relationship between two members; doubts concerning a homosexual officer's ability to command the respect and trust of the person he or she commands; and possible adverse impact on recruiting.[41/]

Judge Norris, writing in dissent from the Ninth Circuit's refusal to rehear Beller en banc, fully exposed the analytical flaws in Judge Kennedy's opinion.[42/] As Judge Norris pointed out, Judge Kennedy gave no critical scrutiny to the relationship between the Navy's asserted interests and its regulations. The Navy offered nothing "to indicate that maintenance of such discipline war-readiness requires that the private lives of Navy members meet the approval of other

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40/ Id. at 810.

41/ Id. at 811.

42/ Miller v. Rumsfeld, 647 F.2d 80 (9th Cir. 1981), cert. denied, 454 U.S. 855 (1981). The critique of Judge Kennedy's treatment of the privacy issue can be found in the section of this report dealing with the right of privacy.

members, citizens of host nations, or the Navy itself. Intolerance is not a constitutional basis for an infringement of fundamental personal rights."[43/]

Judge Norris demonstrated that none of the Navy's asserted problems was in any way confined to homosexual activity. The Navy had experienced tension and hostility between members of different racial groups. Emotional relationships occur between male and female Navy personnel. The Navy could fear that blacks or women might be unable to gain the respect of certain personnel. Yet women and blacks could not be discharged from service on these bases constitutionally. Parents of recruits would be more concerned about their children's association with persons who use dangerous illegal drugs than with homosexuals, yet drug use was not grounds for mandatory discharge. The Navy did not not have a legitimate interest in protecting the sensibilities of intolerant persons in foreign countries.[44/]

Lastly, Judge Norris criticized as disingenuous the Beller panel's conclusion that individual fitness hearings could not be a less restrictive alternative. The Navy

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43/ Id. at 88.

44/ Id. at 88-89.

already used individual fitness hearings extensively for conduct other than homosexuality.[45/]

Judge Kennedy's lack of zeal in protecting the rights of homosexuals is further demonstrated by Singer v. United States Civil Service Commission.[46/] Singer concerned the discharge of a homosexual Equal Employment Opportunity Commission employee. The plaintiff, who disclosed his homosexuality at the time he was hired, was discharged for "immoral and notoriously disgraceful conduct" under the Civil Service regulations. That conduct consisted of embracing a male at his prior place of employment; indicating by dress and demeanor that he intended to continue homosexual conduct; applying for a marriage license with another man; being the subject of publicity in which he identified himself as an EEOC employee; being active on the Board of Directors of the Seattle Gay Alliance, through which his name and place of employment were mentioned in the planning of a symposium; and displaying homosexual advertisements on his car windows.[47/]

45/ Id. at 89-90.

46/ 530 F.2d 247 (9th Cir. 1976), vacated, 429 U.S. 1034 (1977).

47/ 530 F.2d at 249.

Judge Kennedy joined in the opinion of the court upholding the dismissal of plaintiff's civil rights suit. The court held that the discharge of a homosexual was justified by a finding that his conduct affected the efficiency of the Civil Service.[48/] The court accepted the Civil Service Commission's findings that the plaintiff:

> 'openly and publicly flaunt[ed] his homosexual way of life and indicat[ed] further continuance of such activities,' while identifying himself as a member of a federal agency . . . 'impeded the efficiency of the service by lessening public confidence in the fitness of the Government to conduct the public business with which it was entrusted.'[49/]

The court also concluded that the government's interest in promoting the efficiency of the public service outweighed the plaintiff's interest in exercising his First Amendment rights through "publicly flaunting and broadcasting his homosexual activities."[50/] The Supreme Court vacated this opinion in light of a new position by the government.[51/]

As Judge Norris noted about the Navy, the Civil Service "is not in the business of promoting its own moral

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48/ Id. at 255.

49/ Id.

50/ Id. at 256.

51/ 429 U.S. 1034 (1977).

views . . . . Intolerance is not a constitutional basis for an infringement of fundamental personal rights."[52/] The Singer court never questioned why the Civil Service Commission could label homosexuality "immoral and notoriously disgraceful conduct." Clearly the court agreed with this characterization, because it too used the word "flaunt" to describe the plaintiff's openness about his sexual persuasion. Nor does the court ever explain why plaintiff's conduct would affect the efficiency of the Service, other than by lessening public confidence. The court, like Judge Norris, should not have "accepted that the [Civil Service] has a legitimate interest in protecting the sensibilities of intolerant persons . . . ."[53/] The court, with which Judge Kennedy joined, displayed its own intolerance.

In yet another case, Judge Kennedy failed to support the rights of homosexuals. One year before Singer was decided, a district court struck down Civil Service Commission regulations excluding all active homosexuals as

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52/ Miller v. Rumsfeld, 647 F.2d at 88 (Norris, J., dissenting from denial of rehearing en banc).

53/ Id. at 89.

unsuitable for government employment.[54/] The court granted summary judgment for the plaintiff, awarded him backpay and reinstatement, and held that the suit was a proper class action. However, the court denied reinstatement with backpay for other class members.

The Ninth Circuit, in a per curiam opinion, upheld the denial of retroactive relief for the class:

> The court's rationale would invalidate discharge for homosexual activity only where such activity had no rational bearing on the individual's job performance. Thus the issue of liability would have to be separately litigated for each person who claimed to be a class member . . . . It would be burdensome to discover class members and give notice of their right to recover, making the action for reinstatement and backpay difficult to manage.[55/]

The panel cut off retroactive class relief even where the unlawfulness of the service's regulations was clearly established, implying that most class members would not be able to show that their homosexuality had no rational bearing on job performance.

Overall, Judge Kennedy has exhibited a lack of conviction in enforcing the discrimination laws.

54/ Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973), aff'd in part, 528 F.2d 905 (9th Cir. 1975) (per curiam).

55/ 528 F.2d at 906-07.

II

DISCRIMINATION IN EDUCATION, HOUSING, VOTING RIGHTS, AND CRIMINAL LAW

Introduction

Outside of the employment context, Judge Kennedy has further demonstrated a resistance to acknowledging and remedying discrimination. A review of his decisions in the areas of education, housing, voting rights, and criminal law, exposes a lack of sensitivity to discrimination plaintiffs and an unwillingness to give them the opportunity to develop their cases in the courts.

A. Discrimination in Education

Judge Kennedy has authored or joined in opinions in discrimination in education cases that have prevented plaintiffs from developing their cases in the courts. He has terminated existing jurisdiction, denied standing, and upheld summary judgment for defendants. Among the more noted of these decisions is Spangler v. Pasadena City Board of Education.[1/]

In Spangler, the district court had retained continuing jurisdiction over the Pasadena City Board of

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1/ 611 F.2d 1239 (9th Cir. 1979).

Education ("the Board") to remedy racial segregation in public schools held to be unlawful in 1970. The Board claimed to be in compliance with court orders and to have remedied racial segregation in the schools to the extent of its power, and applied to the district court to relinquish jurisdiction. The district court refused to do so, based on evidence indicating that the Board would allow resegregation to occur.[2/]

A Ninth Circuit panel vacated the district court's decision and ordered the district court to terminate the case. The court held that the Board's present compliance with the desegregation plan and its representation that it would continue to engage in affirmative action required an end to jurisdiction.[3/] Judge Kennedy concurred in an opinion joined by Judge Anderson (making it a de facto second opinion of the court), writing separately "to give emphasis to certain aspects of this case."[4/]

Judge Kennedy recognized that the effects of a constitutional violation and proper duration of the remedy

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2/ Id. at 1240.

3/ Id. at 1241-42.

4/ Id. at 1242.

are difficult to measure.[5/] He also recognized that from 1970 to 1977, the Board was not in compliance with the desegregation plan on thirteen occasions.[6/] Nevertheless, Judge Kennedy was willing to err on the side of underestimating the proper duration of the remedy, concluding that the Board had been in "substantial compliance" with the plan, and that the effects of the Board's discrimination had been eliminated.[7/]

The district court had found that if jurisdiction terminated, the Board intended to reinstitute the neighborhood school pattern existing before 1970, which would recreate the pre-1970 racial percentages in the schools. Board members had made public statements criticizing the desegregation plan and endorsing neighborhood schools. The Board had explored alternative student assignment methods that would increase racial imbalance. Judge Kennedy responded:

> I assume, without deciding, that the likelihood a school board will engage in new acts of intentional discrimination may be considered by a court as one factor in favor of retaining jurisdiction to insure the effects of a past violation are eliminated . . . . The

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5/ Id.

6/ Id. at 1243.

7/ Id.

> district court's conclusion, nevertheless, is clearly erroneous based on this record.8/

Judge Kennedy rejected the district court's conclusion, based on hard evidence, regarding the Board's intention to allow resegregation, accepting instead the Board's "official resolution promising not only to engage in no acts of intentional discrimination, but also to adopt and maintain 'affirmative action programs designed to improve racial integration among students, faculty and administrative staff of the District.'"9/

Judge Kennedy conceded that "[t]he Board's future actions may at some date be held unconstitutional,"10/ but potential plaintiffs would then have to commence a new civil action.11/ It would have been consistent with the strong policy of ensuring that constitutional violations be remedied, and with the interests of judicial efficiency, for Judge Kennedy to allow the court's supervision, already in place, to continue until the threat of future unlawful resegregation was eliminated. Instead, Judge Kennedy made it

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8/ Id. at 1245.

9/ Id.

10/ Id. at 1246.

11/ Id. at 1247.

necessary to invoke the court's processes all over again in order to attack continuing violations of the Board.

Judge Kennedy too easily accepted a mere promise by a Board that only nine years before was found guilty of intentional race discrimination in its schools. He was undisturbed by clear evidence that as soon as jurisdiction terminated, the Board would reinstitute neighborhood schools causing resegregation. He was willing to accept nine years as plenty of time to remedy the effects of a racially discriminatory school policy that must have existed for a much longer period of time. Judge Kennedy rationalized as follows:

> Where the court retains jurisdiction, a board may feel obliged to take racial factors into account in each of its decisions so that it can justify its actions to the supervising court. This may make it more, rather than less, difficult to determine whether race impermissibly influences board decisions, for the subject is injected artificially into the decision process, and the weight that racial considerations might otherwise have had is more difficult to determine.12/

The whole point of continuing jurisdiction is to ensure that the violator takes race into account in its decision-making in a permissible and judicially mandated way; there is no need to determine the weight that racial considerations otherwise might have had. Judge Kennedy's obfuscatory

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12/ Id.

rationale displays a resistance to remedying past discrimination, even when the judicial machinery to do so is already in place.

B. Discrimination in Housing

In the housing context, Judge Kennedy interpreted civil rights legislation strictly so as to deny access to courts to race discrimination plaintiffs. In TOPIC v. Circle Realty,[13/] an association of black and white families ("TOPIC") sued three real estate brokers for racial steering, defined as "directing non-white home seekers to housing in designated minority residential areas, and directing white home seekers to housing in designated white residential areas."[14/] TOPIC used teams of black couples and white couples posing as home seekers to uncover racial steering practices. TOPIC's alleged injuries were:

> being deprived of the important social and professional benefits of living in an integrated community . . . embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettoes . . . .[15/]

13/ 532 F.2d 1273 (9th Cir.), cert. denied, 429 U.S. 859 (1976).

14/ 532 F.2d at 1274.

15/ Id.

Judge Kennedy wrote the opinion of the Ninth Circuit holding that TOPIC and its members did not have standing under the Fair Housing Act[16/] to bring their suit because they were not actual home seekers subjected to racial steering. Judge Kennedy distinguished a similar case, Trafficante v. Metropolitan Life Insurance Co.,[17/] in which the Supreme Court held that tenants of an apartment complex had standing under the Fair Housing Act to challenge their landlord's allegedly discriminatory renting practices. Judge Kennedy held that section 3610 of the Fair Housing Act, under which Trafficante was brought, allowed suits to vindicate the rights of third parties, but section 3612, under which TOPIC was brought, did not allow such suits.[18/]

Section 3612 provides that "[t]he rights granted by [the Fair Housing Act] may be enforced by civil actions" in federal or state courts. Judge Kennedy read into this broad language a restriction allowing access to the courts "only to . . . those who are the direct objects of the practices [the Fair Housing Act] makes unlawful."[19/] Judge Kennedy

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16/ 42 U.S.C. §§ 3604, 3612.

17/ 409 U.S. 205 (1972).

18/ 532 F.2d at 1275.

19/ Id.

further restricted the reach of the Fair Housing Act by defining "the direct objects" as those who "make bona fide efforts to buy or rent housing."[20/] Thus, Judge Kennedy concluded that TOPIC did not have standing because its members were not real home seekers and therefore were not the direct objects of any unlawful practices.

Judge Kennedy reasoned that "[s]ection 3610 contemplates the resolution of disputes in the slower, less adversary context of administrative reconciliation and mediation," while "[s]ection 3612 has no pre-conditions to suit."[21/] While section 3612 may provide "preferential access to judicial processes,"[22/] Judge Kennedy did not explain why this leads to the conclusion that it provides no access for plaintiffs like TOPIC.

Judge Kennedy's reasoning and holding in TOPIC were expressly rejected by Justice Powell writing for the Supreme Court three years later in Gladstone, Realtors v. Village of Bellwood.[23/] In Gladstone, residents of a neighborhood used testers to uncover racial steering by real estate agencies

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20/ Id.

21/ Id. at 1276.

22/ Id.

23/ 441 U.S. 91 (1979).

and brought suit under section 3612. The Supreme Court found that "[n]othing in the language of [section 3612] suggests that it contemplates a more restricted class of plaintiffs than does [section 3610]."[24/] Legislative history indicated that "all [Fair Housing Act] complainants were to have available immediate judicial review. The alternative, administrative remedy was then offered as an option to those who desired to use it."[25/]

The Supreme Court went on to hold that the claim of residents that the transformation of their neighborhood from an integrated to a predominantly segregated community deprives them of the social and professional benefits of living in an integrated society is injury sufficient to satisfy the constitutional standing requirement.[26/] Judge Kennedy implied the opposite in TOPIC by distinguishing Trafficante because it involved residents of an apartment building rather than of a community.[27/] As the Supreme Court made clear, "[t]he constitutional limits of respondents' standing to protest the intentional segregation of their community do not

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24/ Id. at 102.

25/ Id. at 106.

26/ Id. at 111-12.

27/ TOPIC, 532 F.2d at 1275.

vary simply because that community is defined in terms of city blocks rather than apartment buildings."[28/]

Judge Kennedy has also displayed a lack of zeal in remedying race discrimination in housing in other cases. For example, in Fountila v. Carter,[29/] a landlord was found guilty of refusing to rent a single family house to plaintiffs because they were a black family. The jury awarded $1 in actual damages and $5,000 in punitive damages.[30/]

Judge Kennedy joined in the opinion of the Ninth Circuit on the landlord's appeal. The court held that the jury was entitled to conclude from the evidence that the defendant discriminated in conscious and deliberate disregard of the plaintiff's rights,[31/] and that the issue of punitive damages was properly submitted to the jury.[32/] The court recognized that "an otherwise supportable verdict must not be disturbed on appeal unless 'grossly excessive,' 'monstrous,' or 'shocking to the conscience.'"[33/]

28/ Gladstone, 441 U.S. at 114.

29/ 571 F.2d 487 (9th Cir. 1978).

30/ Id. at 488.

31/ Id. at 492.

32/ Id. at 491.

33/ Id. at 492.

Notwithstanding these findings, the court vacated the $5,000 punitive damage award. The court found the discrepancy between the punitive and actual damage awards "striking."[34/] The court also held that while the $1000 limitation on punitive damage awards in the Fair Housing Act did not apply, the jury should have been instructed to take it into account in determining the appropriate award.[35/] Further, the jury was not properly instructed on the purpose of punitive damages.[36/] The court, searching for some means of justification for its acts, even considered the landlord's age.[37/] What the court never discussed was the humiliation suffered by the victims of the discrimination and the need to deter such conduct.

C. Discrimination in Voting Rights

Judge Kennedy also has been unsympathetic to race discrimination plaintiffs in the voting rights sphere. In

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34/ Id.

35/ Id. at 495.

36/ Id. at 494.

37/ Id. at 492.

Aranda v. Van Sickle,[38/] members of the San Fernando Mexican-American community brought suit against the city of San Fernando, its Mayor and members of the city council, alleging that the at-large election scheme to elect the city council was unconstitutional. Since 1911, only three Mexican-Americans had been elected to the city council despite the fact that Mexican-Americans comprised approximately fifty percent of the population. Mexican-Americans comprised only twenty-nine percent of the registered voters. The barrio was a geographically distinct community organized along racial lines. Neither members of the city council nor the mayor had lived in the barrio for the ten years prior to the suit.[39/]

Mexican-American poll watchers were harassed by police during the 1972 elections. Private homes of citizens were often used as polling places; without exception, none were Spanish-surnamed households. A very small percentage of Spanish-surnamed persons participated in the operation of elections. Mexican-Americans were sparsely represented on city commissions. The city employed many more whites than

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38/ 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980).

39/ 600 F.2d at 1268-69.

Spanish-surnamed persons, and Spanish-surnamed persons comprised the vast majority of the lower paid employees.[40/]

Plaintiffs alleged examples of the city being unresponsive to the needs of the Mexican-American community. They also cited examples of discriminatory campaign tactics used in elections in which there were strong Mexican-American candidates, and a city letter that implied that a district election system would produce no qualified Mexican-American candidates.[41/]

The district court granted summary judgment for defendants, issuing findings of fact that can only be described as shallow and insulting. For example, the district court found that the concentration of Mexican-Americans in the barrio "is the result of individual desire of the Mexican-Americans to associate with those with similar racial and economic status."[42/] The district court also found that "[t]he failure of Mexican-American voters to elect Mexican-American candidates to the council in proportion to their population in the city is attributable, largely, to apathy of the Mexican-American voters and not to racially

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40/ Id. at 1269.

41/ Id. at 1269-70.

42/ Id. at 1273.

polarized voting."[43/] The Ninth Circuit adopted the district court's findings and agreed with the district court that there was "no proof whatsoever of any restrictive electoral system."[44/]

Although Judge Kennedy found that "[c]ertain conclusions of the trial court do remain troublesome,"[45/] he concurred in the judgment and approach of the circuit court. He acknowledged that the necessary element of intent could be inferred from evidence showing that the political processes leading to nomination and election were not equally open to participation by the group in question. Nevertheless, Judge Kennedy concluded that the evidence could not support such an inference.[46/]

Judge Kennedy was satisfied (and presumably expected fifty percent of the population to be satisfied) with the fact that Mexican-American candidates campaigned in recent elections, and "a Mexican-American candidate was almost elected to the council in 1974."[47/] Judge Kennedy

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43/ Id.

44/ Id. at 1272.

45/ Id. at 1275.

46/ Id.

47/ Id. at 1277.

concluded that location of all private polling places in white homes outside the barrio did not deny access to political processes. He denied plaintiffs the chance to develop this fact at trial, never considering why Mexican-Americans from the barrio would be systematically deterred from exercising their fundamental right to vote by being forced to encroach upon a white middle or upper class private domain in order to do so.

Judge Kennedy rejected the district court's finding that low Mexican-American representation on the council and commissions was due to low civic awareness as a result of high unemployment and low levels of education and not as a result of racial discrimination. He stated that it was not proper on summary judgment to conclude that this was not the product of deliberate bias. Instead of reversing summary judgment, however, Judge Kennedy merely stated that restructuring the election system was not necessarily the appropriate remedy.[48/]

Judge Kennedy also dismissed as insufficient plaintiffs' evidence showing that Mexican-Americans were employed primarily in nonprofessional and lower paid

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48/ Id. at 1278.

categories.[49/] He emphasized San Fernando's small size and long-standing policy of at-large elections.[50/] Here too Judge Kennedy concluded that a finding of intentional discrimination could be made on the facts, but because plaintiffs requested invalidation of the at-large election system, he would not reverse summary judgment.[51/]

Judge Kennedy clearly was troubled by the district court's shallow, insensitive findings. He also believed that summary judgment was not appropriate on the issue of intentional discrimination. His reasoning could have allowed him to give the plaintiffs a chance to develop their facts at trial and he could have suggested alternative appropriate remedies. Instead, he allowed the district court's findings and conclusion to stand on the ground that the requested remedy might not be appropriate.

An interesting counterpoint to Aranda is Flores v. Pierce.[52/] A Mexican-American couple's application for a liquor license was protested by the town police chief, Mayor,

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49/ Id.

50/ Id. at 1279.

51/ Id. at 1280.

52/ 617 F.2d 1386 (9th Cir. 1980), cert. denied, 449 U.S. 875 (1980).

and city councilmen. The California licensing authority initially denied the application based on the protests by the city officials, but later granted it on the plaintiffs' administrative appeal.[53/] Plaintiffs won a jury verdict in their civil rights suit against the police chief, Mayor, and city councilmen, for damages caused by the delay in granting the licenses.

Judge Kennedy, writing for the Ninth Circuit on the defendants' appeal, upheld the verdict. The evidence against the defendants was overwhelming. Of the five applications for licenses made in the period involved in the suit, the only two contested were of Mexican-Americans planning to serve a Mexican-American clientele. The three others were not. All five applications were for the same neighborhood. No application by a non-Mexican-American owner to serve a non-Mexican-American clientele had ever been protested. The city council had insisted on an ad hoc rather than uniform protest policy. There was also clear evidence of statements by defendants invoking racial stereotypes. These facts completely belied defendants' rationale that they were protesting to prevent undue concentration of licenses, to

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53/ Id. at 1388.

promote temperance, and to prevent aggravation of an existing police problem.[54/]

Judge Kennedy concluded that the evidence was more than sufficient to support the finding that defendants acted with the intent to discriminate on the basis of race.[55/] He went on to hold that an official forfeits qualified immunity if he acts with proscribed discriminatory intent.[56/]

The facts in Flores, as Judge Kennedy noted, were nearly as extreme as those in Yick Wo v. Hopkins,[57/] the seminal case holding that the effect of a law may be so harsh against a particular race as to require an inference of intent to discriminate.[58/] In such a case, Judge Kennedy seems willing to enforce a remedy against the wrongdoers. In a case like Aranda, however, Judge Kennedy is not willing to give plaintiffs a chance even to develop their case. Defendants who are not guileless enough to utter racial stereotypes and who practice more subtle and invidious forms of

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54/ Id. at 1389-90.

55/ Id. at 1390.

56/ Id. at 1392.

57/ 118 U.S. 356 (1886).

58/ 617 F.2d at 1389.

race discrimination have much less to fear from Judge Kennedy.

D. Discrimination in Criminal Law

As discussed above, Judge Kennedy's treatment of sex discrimination in employment displays lack of sensitivity to, and resistance to enforcement of, the constitutional rights of women. Two cases outside the employment context follow that trend.

In United States v. Smith,[59/] three male inmates of a federal penitentiary were found guilty of committing forcible sodomy on another male prisoner. They were convicted under the federal Assimilative Crimes Act[60/] by application of a Washington statute that defined the offense of rape to include homosexual sodomy.[61/] The federal rape statute only applied to the rape of a female.[62/]

The defendants argued that application of the Washington statute denied them equal protection because conviction under that statute carried a twenty-year minimum

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59/ 574 F.2d 988 (9th Cir. 1978), cert. denied, 439 U.S. 852 (1978).

60/ 18 U.S.C. § 13.

61/ Wash. Rev. Code Ann. §§ 9.79.170, .140 (1977).

62/ 574 F.2d at 990.

sentence while conviction under the federal rape statute carried no such minimum.[63] Defendants argued that Congress acted with reference to homosexual rape when it enacted the federal rape statute.

Judge Kennedy, writing for the court, held that equal protection was not violated when Congress punished one offense by assimilation of a state statute but provided its own definition and punishment for a rationally distinguishable offense.[64] To reach that holding, Judge Kennedy concluded that rape of a female and homosexual sodomy were rationally distinguishable offenses. Judge Kennedy wrote:

> It is rational to determine that the harm, both physical and mental, suffered by victims of these two crimes are of a different quality in each instance. These distinctions are reflected in traditions and community attitudes that have prevailed for centuries, and penal laws may properly take account of such differences by assigning a separate generic classification to each offense.[65]

The implication of Judge Kennedy's opinion is clear: Rape of a male is a more heinous crime than rape of a female. Judge Kennedy's opinion subjected the defendants to a stricter statute than they would have been subjected to had

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63/ Id. at 991.

64/ Id.

65/ Id.

they gang-raped a woman. He pointed out that the Washington statute, which defined rape of a female and sodomy as the same offense, was an exception among the states and the Model Penal Code.[66/] He supported the distinction between heterosexual and homosexual rape with "traditions and community attitudes that have prevailed for centuries," traditions that have given short shrift to the seriousness of heterosexual rape.

Judge Kennedy could have commended the state of Washington for recognizing that the rape of a man is no more heinous than the rape of a woman. He could have ruled that the federal rape statute must be interpreted to apply to male rape victims as well as female rape victims or be unconstitutional. Instead, he propagated the myth that the rape of a woman is somehow more natural than the rape of a man.

In United States v. Flores,[67/] Judge Kennedy joined in a per curiam opinion that reviewed the sentences of a husband and wife who were both found guilty of the same federal drug violations. The husband was sentenced for a three year internment with a subsequent three year special

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66/ Id. at 990.

67/ 540 F.2d 432 (9th Cir. 1976) (per curiam).

parole. The wife was sentenced as a young adult offender to a three year term of probation.[68/]

The trial judge made the following statement before sentencing:

> With respect to Marcela Flores, I'm also convinced that she is just as guilty as is her husband. And, but for one factor, I would feel obligated to impose upon her the same sentence imposed upon her husband. But she does have a child and is expecting another one. And I just don't think the interests of justice require the Government to take both parents away from these children.[69/]

The husband claimed that the unequal sentence based upon pregnancy constituted unlawful sex discrimination.

The Ninth Circuit, with virtually no analysis, concluded that the wife's preferential treatment based upon "her condition" was rational and within the discretion of the trial court, and that the husband's rights were in no way prejudiced.[70/] The court noted that there is no requirement that two people convicted of the same crime receive identical sentences. The court stated that the Supreme Court has held

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68/ Id. at 438.

69/ Id.

70/ Id.

that discrimination based on pregnancy is not invidious and therefore does not violate equal protection.[71/]

This opinion can be characterized as nothing short of disgraceful. The Constitution may not require that two people convicted of the same offense receive the same sentence, but surely a judge cannot constitutionally give a black man or a woman a lengthier sentence simply because of his race or her sex. The judge made clear that the only reason he was able to avoid being "obligated" to impose identical sentences was the fact that the wife was pregnant and that "she" already had one child.

Contrary to the court's implication, the Supreme Court did not hold that the Constitution permits discrimination based on the mere fact of pregnancy. The court in Flores cited without analysis one Supreme Court case, and ignored another one, Cleveland Board of Education v. La Fleur,[72/] which struck down school board regulations governing pregnant teachers.

The court reinforced the stereotype that women are and must be the caretakers of their children, and that

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71/ Id.; see Geduldig v. Aiello, 417 U.S. 484 (1974) (state insurance fund not required to provide benefits for "normal pregnancy").

72/ 414 U.S. 632 (1974).

fathers do not share equally in that responsibility. The court made clear its bias when it stated that "she [not 'they'] does have a child."[73/] Flores is an ominous decision for female plaintiffs who hope that Judge Kennedy will look upon them as equal to men. The lack of any analysis of this blatant judicial enforcement of sexual stereotypes indicates that the court did not consider this a very serious issue.

73/ 540 F.2d at 438.

III

RIGHT TO PRIVACY

Introduction

Judge Kennedy's views on the right to privacy are difficult to discern. Moreover, his philosophy regarding important fundamental rights, such as the right to privacy, not specifically stated in the Constitution is murky. As in other areas, Judge Kennedy seems extremely hesitant -- even in a speech on the subject -- to give much more than an oblique statement of his theoretical approach to what he calls "unenumerated rights."[1/]

A close reading of Judge Kennedy's sparse writings on privacy reveals a few disturbing points. His only significant privacy decision, Beller v. Middendorf[2/], employed a dubious method of analysis that both avoids the hard issues and dilutes the right of privacy as defined by the Supreme Court. In this case, Judge Kennedy upheld the Navy's discharge of servicemen for homosexual activity.

1/ Speech by Anthony M. Kennedy to the Canadian Institute for Advanced Legal Studies, The Stanford Lectures, "Unenumerated Rights and the Dictates of Judicial Restraint" (Unpublished, Stanford University, 1986) (hereinafter "Unenumerated Rights").

2/ 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

However, Judge Kennedy did cite the generation of Supreme Court privacy decisions as precedent in Beller.

Further, Judge Kennedy indicated in his speech that he considers privacy the least legitimate of the "unenumerated rights" recognized by the Supreme Court. He ultimately questions the legitimacy of all of these rights based on his personal philosophy of the role of the Constitution.3/

Analysis

In Beller, Judge Kennedy's most important privacy decision, Judge Kennedy upheld a Navy regulation mandating the discharge for homosexual activity regardless of an individual's fitness for naval service. In highly questionable analysis, Judge Kennedy stated he did not have to address the important question of whether consensual private homosexual conduct is a fundamental right. Traditional privacy analysis is under the "due process clause" of the Fifth Amendment which prohibits deprivation of life, liberty or property without due process of law. This analysis asks whether the conduct in question is a fundamental right, and then as a second step asks whether the infringement of the right by the government would further "compelling state

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3/ "Unenumerated Rights."

interests" and whether the infringement required be narrowly tailored to further those interests. Judge Kennedy recognized that this is the analysis used in Supreme Court privacy decisions such as Roe v. Wade.[4/] However, Judge Kennedy inexplicably glossed over the privacy analysis engaged in by the Supreme Court in favor of a new balancing approach.[5/]

Judge Kennedy's balancing approach grafted what is traditionally equal protection analysis onto due process analysis. Courts structure the first, "fundamental right," question posed under substantive due process analysis differently when using an equal protection approach. The question becomes the government's action against the protected class of individuals, i.e. homosexuals, must pass the higher strict scrutiny test or some other more

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4/ 632 F.2d at 807.

5/ Kennedy claimed that opinions in Zablocki v. Redhail, 434 U.S. 374 (1978), and Moore v. City of East Cleveland, 431 U.S. 494 (1977), supported a substantive due process analysis that balanced the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals. 632 F.2d at 807. As Kennedy's colleague, Judge Norris, pointed out in an emphatic dissent from a denial of a rehearing of Beller, this test has in fact never been supported by the full Court. Miller v. Rumsfield, 647 F.2d 80, 81-82 (9th Cir. 1981), cert. denied, 454 U.S. 855 (1981). See also infra pp. 6-7.

forgiving test such as the rational basis test. Judge Kennedy was unable to fit consensual homosexual conduct into either a strict scrutiny or rational basis category, using instead a special intermediate tier for homosexuals. Judge Kennedy then concluded that under this intermediate test, the Navy's regulation was constitutional. In so concluding, Judge Kennedy relied heavily on the military context of the case, and the special deference given the military.

By inexplicably using a method of analysis that departs from traditional privacy analysis, Judge Kennedy was able to duck answering the hard question of whether there is a right to privacy for homosexual activity.

Further, Judge Kennedy acknowledged the existence of "substantial academic comment" in favor of including homosexual conduct in the right to privacy and was willing to "concede" -- but only "arguendo" -- that some kinds of government regulation of homosexuals may face "substantial constitutional challenge."[6/] Judge Kennedy failed to state his views any more definitely.

However, Judge Kennedy let the alleged interests of the Navy override the "heightened solicitude" he had just conceded may be due consensual homosexual conduct.

6/ 632 F.2d at 809-10.

He gave uncritical deference to the Navy without examining the legitimacy of the Navy's claims, including the claim that:

> a substantial number of naval personnel have feelings, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties.[7/]

Similar "feelings" about members of a particular race or religion would not be considered legitimate under the Constitution.[8/] This shows the lack of scrutiny Judge Kennedy gave to the regulation in question.

Although the Supreme Court recently refused to extend privacy protection to private consensual homosexual conduct in Bowers v. Hardwick (which upheld Georgia's criminal sodomy statute),[9/] as did Judge Bork in an earlier case on facts very close to those in Beller (which reached the same result as Kennedy did),[10/] both of these decisions squarely addressed the question of whether the Supreme Court's privacy decisions extended to private consensual

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7/ Id. at 811-812.

8/ Miller, 647 F.2d at 88 (Norris, J., dissenting from denial of rehearing en banc).

9/ 106 S. Ct. 2841 (1986).

10/ Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

homosexual conduct. Similarly, Justice Powell, whom Judge Kennedy was nominated to replace, addressed the fundamental rights question in Moore v. City of East Cleveland[11/] in deciding that he would extend the privacy cases to invalidate a zoning ordinance that in essence required the break-up of extended families. Moreover, in City of Akron v. Akron Center for Reproductive Health, Inc.,[12/] Justice Powell noted for the Court, that "restrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest."[13/] Judge Kennedy did not follow this approach in Beller.

In short, Beller is an analytically confusing opinion. Whether Judge Kennedy's dubious approach is the result of his discomfort with the right to privacy and unenumerated rights altogether, is not clear.

In addition to Beller, Judge Kennedy decided a few other opinions that touched on the issue of right to privacy. None of them clearly indicate Judge Kennedy's views on whether such a right exists under the Constitution. For

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11/ 431 U.S. 494 (1977).

12/ 462 U.S. 416 (1983).

13/ Id. at 427 (emphasis added).

example, Judge Kennedy joined an opinion denying a privacy claim finding that the right to privacy did not prevent a city from requiring that the viewing areas of public establishments containing film or videotape viewing devices (booths where sexually explicit films were shown) be visible from a continuous main aisle.[14/]

Also, in a self-described "emphatic dissent" in a criminal procedure case, United States v. Penn,[15/] Kennedy relied in part on two privacy cases, -- Moore[16/] and Pierce v. Society of Sisters[17/] -- in criticizing the majority's acceptance of a police officer's bribe of a five-year-old child in order to procure evidence against the child's mother. Characterizing the "parent-child union" as an "essential liberty" that has a "fundamental place in our culture," Kennedy stated that the bribe constituted a severe and manipulative intrusion into this union.[18/] He would have

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14/ Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243 (9th Cir. 1982).

15/ 647 F.2d 876, 888 (9th Cir. 1980) (en banc) (Kennedy, J., dissenting), cert. denied, 449 U.S. 903 (1980).

16/ 431 U.S. 494 (1977).

17/ 268 U.S. 510 (1925) (parents have right to opt out of public school attendance for their children in favor of private schools).

18/ 647 F.2d at 888-89.

excluded the evidence discovered using the bribe. Interestingly, he nowhere mentions the concept of "privacy."

Accordingly, Judge Kennedy's decisions neither expressly accept or reject a constitutional right of privacy. However, it is of particular concern in the privacy area that his Beller opinion did not explain, affirm, or expressly adopt the reasoning of Griswold, Roe, and other privacy cases.

Concerns raised by Beller only deepen upon a reading of Judge Kennedy's 1986 speech at Stanford University, "Unenumerated Rights and the Dictates of Judicial Restraint."[19/]

In "Unenumerated Rights", Judge Kennedy said that the "constitutional text and its immediate implications, traceable by some historical link to the ideas of the Framers, must govern the judges."[20/] He further suggested that the essential rights in a "just" system are not coextensive with the essential rights of the American constitutional regime,[21/] noting that despite the "spacious" language of the Bill of Rights and the Civil War amendments, it is the

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19/ "Unenumerated Rights."

20/ Id. at 20.

21/ Id. at 13.

political branches that have the responsibility, and the legitimacy, to determine the "attributes of a just society."[22/]

These views ultimately led him to question the legitimacy of fundamental rights, in particular the right to privacy. While he noted that it "forts constitutional dynamics, and it defies the [precedential] method to announce in a categorical way" that there can be no unenumerated rights,[23/] he also noted that the exercise of enumeration has been fraught with "persistent difficulties"[24/] and put the judiciary in a "tentative position."[25/] For Judge Kennedy, the most plausible justification for such rights is to find some foundation for them in the structure of the constitution -- the right to travel, he suggests, plausibly may be justified as inherent in a system of federalism, while the right to vote can be explained as a necessary reenforcement of state political processes.

22/ Id. at 3.

23/ Id. at 5.

24/ Id. at 16.

25/ Id. at 5.

Kennedy could find no such "plausible" justification for the right of privacy, however.[26/] Indeed, in discussing the right that has been characterized as "the most comprehensive of rights and the right most valued by civilized men . . . the right to be let alone,"[27/] Kennedy relies almost exclusively on Bowers, the 5-4 Supreme Court sodomy decision that is the most critical of the idea of a right to privacy.

Moreover, Roe v. Wade and the many subsequent decisions explicitly affirming it are not discussed; Griswold is merely mentioned in passing. The results in Meyer v. Nebraska,[28/] which overturned a law forbidding the teaching of German in elementary schools, and Pierce v. Society of Sisters,[29/] which prevented a state from forcing children into public, as opposed to parochial, or other private school, "seem correct and fully sustainable" because of the

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26/ Id. at 6.

27/ Bowers v. Hardwick, 106 S. Ct. 2841, 2848 (1986) (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

28/ 262 U.S. 390 (1923).

29/ 268 U.S. 510 (1925).

relationship they bear to freedom of expression under the First Amendment.[30/]

Most importantly, however, Kennedy seems to suggest that at least the right to engage in homosexual conduct may be one of the rights best left to the "just," rather than the "constitutional" society:

> Many argue that a just society grants a right to engage in homosexual conduct. If that view is accepted, the Bowers decision in effect says the State of Georgia has the right to make a wrong decision -- wrong in the sense that it violates some people's views of rights in a just society. We can extend that slightly to say that Georgia's right to be wrong in matters not specifically controlled by the Constitution is a necessary component of its own political processes. Its citizens have the political liberty to direct the governmental process to make decisions that might be wrong in the ideal sense, subject to correction in the ordinary political process.[31/]

Thus, as the right to travel and to vote are "plausible" because they bear some relationship to the necessities of the constitutional system, a right to engage in private consensual homosexual conduct may not be justified because the structure of the political process requires this result.

30/ "Unenumerated Rights" at 12.

31/ "Unenumerated Rights" at 13-14.

Kennedy's apologia for Bowers fits neatly with his "plausibility" test for fundamental rights.

As he did in Beller, Judge Kennedy simply casts doubt on his willingness to recognize a right to privacy, but does not clearly state his views.

IV

CRIMINAL PROCEDURE

Introduction

Judge Kennedy's record in criminal procedure cases reveals several areas of concern. He has narrowly interpreted rights established for criminal defendants under the Fourth, Fifth, and Sixth Amendments to the Constitution. However, it must be noted that his respect for precedent -- including the oft-maligned exclusionary rule and Miranda warnings -- has caused him to uphold, occasionally begrudgingly, many constitutional claims.

In Fourth Amendment search and seizure cases, Judge Kennedy has sought loopholes in the exclusionary rule and has limited the areas in which we all can claim a legitimate expectation of privacy, but he has argued for suppression of evidence in egregious cases.

His approach to Fifth Amendment issues such as Miranda warnings and double jeopardy is often mechanical, and at times is disturbingly narrow in its view of constitutional protection for the accused. He tends to give these protections a very technical application, thus declining to address the potential harm unforeseen and unintended by the creators of those protections.

Likewise, in Sixth Amendment decisions on the right to counsel and the right to confront adverse witnesses, he

has charted a narrow course. He has been unsympathetic to claims of ineffective assistance of counsel and has been willing to uphold convictions in which significant Sixth Amendment considerations were arguably compromised.

A. The Exclusionary Rule

Despite infrequent gripes about its inflexibility, Judge Kennedy has generally followed precedent in applying the exclusionary rule. He has, however, recently demonstrated a willingness to expand loopholes to that rule. In United States v. Peterson,[1] Judge Kennedy went beyond the limits set out by Supreme Court precedent and expanded the "good faith" exception to the exclusionary rule as enunciated by the Supreme Court in United States v. Leon.[2] This exception allows admissal of evidence when the police act in good faith based on a facially valid, but technically deficient, warrant. Judge Kennedy seized on the rationale of Leon to allow admission of evidence seized in an illegal search that, unlike Leon, had nothing to do with a deficient warrant. In Peterson, the defendants were arrested based on evidence gathered in part from overseas wire-taps conducted illegally

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1/ 812 F.2d 486 (9th Cir. 1987).

2/ 468 U.S. 897 (1984).

by Filipino law enforcement agents and represented to United States agents as legal under Filipino law.

Conceding that Leon addressed only good faith reliance on a facially valid search warrant, Judge Kennedy argued that "the exclusionary rule does not function as a deterrent in cases in which the law enforcement officers acted on a reasonable belief that their conduct was legal."[3/] He then expanded the good faith exception to include objectively "reasonable" reliance on foreign law enforcement officers' representations that they have complied with their own laws. This expansion is quite troubling, for Kennedy's analysis reveals the seeds of possible emasculation of the exclusionary rule and its twin values of deterring police misconduct and preserving the integrity of the judicial system.

Fear of a crusade against the exclusionary rule by this judge must be tempered somewhat, however, as Judge Kennedy has not seen fit to apply the exception at every opportunity presented to him. In United States v. Spilotro,[4/] Judge Kennedy wrote the opinion for the court affirming the district court suppression order and specifically declined to

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3/ Peterson, 812 F.2d at 492.

4/ 800 F.2d 959 (9th Cir. 1986).

apply the good faith exception of Leon to an instance where a warrant was overly broad. The warrant in question did not describe the items to be seized with sufficient particularity. Instead, it listed as items to be seized any evidence of a violation of thirteen broad statutes. Unlike the unique situation later presented in Peterson, the Leon decision specifically addressed this scenario. Thus, Kennedy held that this overbreadth rendered the warrant "so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid."[5/] It remains to be seen (and the Committee should inquire) as to when, in other cases involving tempting situations not previously addressed by the Supreme Court, Judge Kennedy would again expand the exception.

Once hesitant to fashion or invoke exceptions to the exclusionary rule, Judge Kennedy has seemingly grown more venturesome in recent years. In one of his earlier criminal procedure opinions, United States v. Rubalcava-Montoya,[6/] Judge Kennedy declined to take an opportunity to expand the "emergency circumstances" exception to the exclusionary rule.

5/ Id. at 968 (quoting Leon, 468 U.S. at 923).

6/ 597 F.2d 140 (9th Cir. 1978).

The court reversed two convictions, finding that a customs agent had insufficient cause to search the trunk of a defendant's car, a search that resulted in finding five illegal aliens. The government argued that although the officer lacked probable cause to search, his good faith belief that human life might be in danger justified a search. In a footnote, Judge Kennedy admitted that "[t]he invitation to recognize that a policeman should be encouraged to act in emergency circumstances [absent probable cause] . . . is tempting."[7/] He declined to accept that invitation, however, because "such a rule would be a clear extension of existing precedents . . . ."[8/]

Just two years later, however, in United States v. Gardner,[9/] Judge Kennedy relied on the "exigent circumstances" exception to uphold a conviction obtained by a cursory warrantless search of the upper level of a house in which a suspect had just been arrested, on the premise that there had been individuals in the house who posed a danger to the officers present. And in a concurrence in Satchell v.

7/ Id. at 143 n.1.

8/ Id.

9/ 627 F.2d 906 (9th Cir. 1980).

Cardwell,[10] Judge Kennedy wrote that a police officer's opening of defendant's screen door was "reasonable and necessary" under the exigent circumstances and thus did not merit application of the exclusionary rule. The court affirmed the district court's denial of the habeas corpus petition.

Judge Kennedy has demonstrated a troubling tendency to limit the scope of the Fourth Amendment right to be free from unreasonable searches and seizures, a threshold issue under the exclusionary rule.

In United States v. Sledge,[11] Judge Kennedy upheld convictions based on the warrantless search of an apartment that appeared to have been abandoned, when in fact the defendants may have intended to return. Defendants had given the landlord notice of their intent to vacate their apartment by the end of the month. Two days prior to the end of that month, the landlord observed that the front door of the apartment was left wide open for several hours. The next day the landlord returned to the apartment, where he found a note he had left still on the door. Entering the apartment, he

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10/ 653 F.2d 408, 414 (9th Cir. 1981) (Kennedy, J., concurring), cert. denied, 454 U.S. 1154 (1982).

11/ 650 F.2d 1075 (9th Cir. 1981).

found it virtually empty of defendants' belongings, although there were five or six items of their clothing still there. Concluding that the defendants had vacated their apartment, the landlord began to clean it, whereupon a shotgun and paraphernalia connected with the manufacturer of PCP were discovered. The landlord then called an agent of the DEA, to whom he explained his actions of the previous few days. He told the agent he had retaken possession of the apartment because he thought the tenants had vacated. The agent then seized several items of evidence in the apartment.

Judge Kennedy found for a divided panel that the officer had reasonable grounds to conclude that the premises had been abandoned by the defendants. Thus, they had no legitimate Fourth Amendment privacy interest in the apartment, and any evidence seized in it was not subject to the exclusionary rule.

In a dissent, Judge Fletcher opined that defendants had exhibited a subjective expectation of privacy in the apartment, and thus a warrant should have been obtained.

In United States v. Allen,[12/] an opinion that the nominee listed as one of his twenty-five most significant

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12/ 675 F.2d 1373 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981).

opinions in his response to the Judiciary Committee Interrogatories, Judge Kennedy premised his decision on minimizing the appellants' expectation of privacy. In that case, customs agents had become suspicious of ongoing activities on defendant Allen's property near the coast of Oregon. A warrantless helicopter surveillance was conducted, in which photographs of the ranch property were taken through a telephoto lens. One agent carried out on-site surveillance when he accompanied two officials of the Bureau of Land Management who were visiting the ranch to seek a public easement across the ranch for fishermen and hunters. He declined to identify himself as an agent when challenged by Allen. Several officers trespassed on Allen's property in search of evidence, although none was taken at that time. Seismic sensors to monitor vehicular activity in and around the property were placed at the entrances to Allen's ranch.

Notwithstanding the questionable tenor of this aggressive investigation, Kennedy wrote the opinion upholding the convictions. While conceding that one need not construct "an opaque bubble over his or her land in order to have a reasonable expectation of privacy,"[13/] Judge Kennedy wrote that several factors existed to reduce Allen's expectation of

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13/ Id. at 1380.

privacy in this instance. Those factors included the fact that the ranch was virtually on the United States seacoast border where Coast Guard helicopters routinely traversed the nearby air space, thus diminishing any subjective privacy expectation.

Judge Kennedy held that the customs agent's concealment of his identity on the visit to the ranch did not violate the Fourth Amendment. Judge Kennedy also expressed "doubt" that the trespass by agents onto the ranch during the course of the surveillance violated the Fourth Amendment, but since no evidence resulted from that action, no further consideration was needed. In addition, while Allen's chance arrest on a nearby road 37 hours after the agents raided the ranch was admittedly illegal, Judge Kennedy held that it was not a basis for reversing the conviction.

In United States v. Sherwin,[14/] Judge Kennedy held for an en banc court that a search made of broken cartons containing allegedly obscene books by the manager of a trucking terminal was not a "search" within the aegis of the Fourth Amendment, and that subsequent FBI review of the materials displayed to them by the manager was not a "seizure" under the Fourth Amendment. The key issue on this appeal

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14/ 539 F.2d 1 (9th Cir. 1976) (en banc).

from a suppression order was whether the subsequent review of those books by the FBI, without a warrant, was legal. Judge Kennedy found it was, because "once a private search is completed, the subsequent involvement of government agents does not retroactively transform the original intrusion into a governmental search."[15/]

In Sherwin, Judge Kennedy specifically declined to follow a recent decision in United States v. Kelly,[16/] which held that the government's subsequent acquisition of books discovered in a private search constitutes a "seizure" in violation of the Fourth Amendment. In Walter v. United States,[17/] a case presenting a factual setting similar to Sherwin and Kelly, the Supreme Court adopted the latter's reasoning -- not Kennedy's -- in holding that the Fourth Amendment required FBI agents to obtain a warrant before viewing allegedly obscene films from a private citizen who had mistakenly received the shipment of films and opened the film containers.

15/ Id. at 6.

16/ 529 F.2d 1365 (8th Cir. 1976).

17/ 447 U.S. 649 (1980).

While not out of the judicial mainstream, Kennedy's opinions in Sledge, Allen, and Sherwin reveal a limited view of the scope of the Fourth Amendment right to privacy.

Judge Kennedy appears more likely to grant the government the power to conduct warrantless searches under the "administrative" or "regulatory" exception to the warrant clause. In a dissent to United States v. Piner,[18/] Judge Kennedy argued that random safety checks of private boats by the Coast Guard are not unreasonable within the meaning of the Fourth Amendment. The majority held that the random stopping and boarding of a vessel after dark for safety and registration inspection, where there is no cause to suspect noncompliance, was not justified by any governmental need to enforce compliance with safety regulations and thus constituted a violation of the Fourth Amendment. It therefore upheld a suppression order. Citing what he termed the long history of Coast Guard boarding authority and the exception for administrative searches, Judge Kennedy, dissenting, implied that operators of vessels at sea had a lesser expectation of privacy, at least with regards to Coast Guardsmen boarding their decks. In United States v. Villamonte-

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18/ 608 F.2d 358 (9th Cir. 1979).

Marquez,[19/] an unrelated case, the Supreme Court held that a warrantless and suspicionless stop of a vessel was reasonable under the Fourth Amendment, thus implicitly vindicating Judge Kennedy's reasoning.

Moreover when confronted with instances of police practices he deems egregious, Judge Kennedy has been forceful in applying the exclusionary rule.

In United States v. Penn,[20/] Judge Kennedy dissented from an en banc decision that permitted the government to introduce as evidence a jar of heroin pointed out by the defendant's five-year old son after the police had offered the child $5 to show them its location. The majority held that although they "disapprove[d] of the police tactic used," there was no constitutional ground on which to suppress the evidence.

Judge Kennedy emphatically disagreed. He condemned the tactic used by police as an assault on the parent-child relationship, labeling it "pernicious in itself and dangerous as precedent."[21/] To allow the fruits of such a search to be

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19/ 462 U.S. 579 (1983).

20/ 647 F.2d 876 (9th Cir.) (en banc), cert. denied, 449 U.S. 903 (1980).

21/ Id. at 889.

admitted as evidence "distorts the idea of reasonableness" under the Fourth Amendment, even assuming the police were acting in good faith.[22/] In one of his most eloquent (if rare) defenses of civil liberties, Kennedy wrote: "Indifference to personal liberty is but the precursor of the state's hostility to it."[23/]

In United States v. Rettig,[24/] Judge Kennedy authored an opinion overturning the convictions of two alleged cocaine smugglers on the grounds that Drug Enforcement Agency ("DEA") agents had "substantially exceeded any reasonable interpretation" of the provisions of a search warrant.[25/] In that case, a federal magistrate denied a search warrant to investigate cocaine smuggling but issued an arrest warrant, which the DEA then executed. Agents arrested one of the defendants, with marijuana in his possession, at his residence. Agents then obtained a search warrant from a state court judge, ostensibly to discover and seize evidence to support the charge of marijuana possession. No mention was made to the state judge of the previous day's denial of a

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22/ Id. at 888.

23/ Id. at 889.

24/ 589 F.2d 418 (9th Cir. 1978).

25/ Id. at 423.

search warrant or of intent to search for evidence of the cocaine conspiracy.

Judge Kennedy determined that the breadth and character of the search conducted by the DEA indicated that it was in effect a search for evidence pertaining to the cocaine charge and not to the marijuana charge. The nondisclosure of the search's true objective "deprived [the judge] of the opportunity to exercise meaningful supervision over their conduct and to define the proper limits of the warrant."[26/] Thus, the fourth amendment safeguard -- having a neutral and detached magistrate oversee a search -- was abrogated, and the warrant was transformed into an instrument for conducting an illegal general search. Judge Kennedy's sanction for this tactic was severe: all evidence was suppressed.

In United States v. Cameron,[27/] Judge Kennedy reversed a conviction where he held for the court that the procedures used by the police in carrying out the body cavity search of a drug smuggling suspect were unreasonable and in violation of the Fourth Amendment. Judge Kennedy harshly criticized the insensitive and oppressive methods used by the officers, who subjected Cameron to two forced digital probes,

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26/ Id. at 422.

27/ 538 F.2d 254 (9th Cir. 1976).

to two enemas, and to forced consumption of liquid laxative, despite his continued protest. "Any body search, if it is to comport with the reasonableness standard of the fourth amendment, must be conducted with regard for the subject's privacy and be designed to minimize emotional and physical trauma."[28/] Finding that less intrusive means of obtaining the evidence could have been considered, including holding the suspect until a warrant (not required, but a positive factor in assessing reasonableness) was obtained, Kennedy applied the exclusionary rule to suppress the evidence. Although a quantity of heroin was ultimately found in this instance, he expressed skepticism about whether such tactics are even effective.

B. Miranda Warnings

Judge Kennedy's opinions reveal a technical approach to issues arising under Miranda v. Arizona,[29/] a case that requires police to tell suspects their rights. Not unlike other jurists, Judge Kennedy has applied the rule of Miranda as a "bright line" test; if the police advised a defendant of the Miranda warnings when required, ensuing

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28/ Id. at 258.

29/ 384 U.S. 436 (1966).

incriminating statements were ruled admissible. Conversely, if the police had failed to so advise a defendant, any incriminating statement was ruled inadmissible.

The Miranda warnings were crafted to provide a prophylactic means to insure that any incriminating statement made by a defendant was made voluntarily and intelligently and was not the product of police coercion. While adhering to a faithful technical application of Miranda, Judge Kennedy has displayed little inclination to apply the precepts underlying the Miranda decision to situations where similar concerns suggest it may be advisable.

For example, in United States v. Contreras,[30/] Judge Kennedy, writing for the court to affirm the convictions, appeared to rely on the fact that Miranda warnings were duly recited to defendants as satisfaction of the underlying premises of Miranda, and declined to scrutinize in depth whether or not the incriminating statements made were in fact voluntarily and intelligently given. In Contreras, the defendants had been given a state grant of immunity in exchange for certain information about a California crime gang. After the defendants had been granted their state

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30/ 755 F.2d 733 (9th Cir. 1985), cert. denied, 474 U.S. 832 (1985).

immunity, they were interviewed by federal agents whom the state investigators kept regularly informed about developments in the investigation of the gang. Before being interviewed by the federal agents, the defendants were each advised of their Miranda rights. Each defendant later testified before a grand jury, again after being advised of his Miranda rights. Defendants were subsequently indicted and convicted in federal court for violations of various RICO provisions.

The defendants challenged the district court's finding that the waivers were knowing and intelligent, arguing that the Miranda warnings should have been expanded to include advice that the testimony they had given under the grant of state immunity could not be used against them in a federal prosecution. The interrogation should not have begun, defendants argued, until they were given explicit advice that their previous state testimony could not be used in any manner. The fact that they were not so warned meant that their waivers were not intelligently given, and the statements made should therefore be suppressed. The dissent agreed with the contention that the defendants had not made a knowing and intelligent waiver of their Fifth Amendment privilege against self-incrimination "because the advice of the agents would have reasonably led the defendants to

believe that, for purposes of the federal prosecution, their silence had already been broken."[31/]

Judge Kennedy disagreed. "The Miranda warning, now so central for law enforcement in every jurisdiction, would be unworkable if lower courts were to begin drafting required supplements to it for various types of cases."[32/] He opined that the "ordinary sense of the agents' remarks"[33/] was such that there was no objective flaw or misleading inference in the advice given by the federal agents. Judge Kennedy declined to investigate further the voluntariness issue once the warnings were found to have been given. "The Miranda warnings given by the agents and their explicit warnings that federal prosecution could be commenced were all that the circumstances of this case required."[34/]

Judge Kennedy has applied the same technical approach when granting defendants relief for police failure to read Miranda rights. In United States v. Scharf,[35/] Judge

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31/ Id. at 738 (Canby, J., concurring in part and dissenting in part).

32/ Id. at 736.

33/ Id. at 737.

34/ Id.

35/ 608 F.2d 323 (9th Cir. 1979).

Kennedy demonstrated his technical approach to the rule of Miranda when the police failed to comply with the procedures. In that case, police officers suspected that defendant Coolidge was somehow involved in a bank robbery. Over the course of several encounters, Coolidge was questioned by the police on the highway, at the site of the robbery, while sitting in a police car, and several times in his home. At no time was any Miranda warning given.

In focusing on the encounters in which incriminating statements were made by Coolidge, the court determined that the questioning had taken place in a custodial setting, thus requiring the Miranda warnings be given. Judge Kennedy's opinion for the court focused on the considerable time Coolidge had spent talking to police, the pervasive presence of police officers and police cars near his home, and the intensity of surveillance of the defendant to conclude that "the suspect in the circumstances faced significant restraints and . . . was not free to leave. His statements were the product of police interrogation conducted without the Miranda warnings required by his custodial status, and they must be suppressed."[36/]

36/ Id. at 325.

In Neuschafer v. McKay,[37/] Judge Kennedy wrote for a divided panel that remanded a petition for habeas corpus to the district court for an evidentiary hearing to determine whether a confession was legally obtained. Neuschafer, who had been convicted and sentenced to death for the murder of a fellow inmate, contended that his constitutional rights were violated by use of a confession derived from an interrogation begun four days after he had requested a lawyer and none was provided.

Citing the controlling precedent of Edwards v. Arizona,[38/] which bars the use of any confession after a suspect has requested a lawyer unless the suspect has initiated the interview leading to his confession and has knowingly and intelligently waived his rights to counsel before confessing, Judge Kennedy determined that the issue of whether Neuschafer initiated the conversation that led to his confession remained unresolved. One member of the panel disagreed, chiding the majority for prolonging a case in which it was clear that the defendant was guilty.

The case returned to the Ninth Circuit after the evidentiary hearing by the district court. The lower court

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37/ 807 F.2d 839 (9th Cir. 1987).

38/ 451 U.S. 477 (1981).

found that in the course of the investigation about the murder Neuschafer had requested an attorney, who was not provided. Several days later, still not having been provided with an attorney, Neuschafer handed a note to a prison guard requesting a meeting to talk about the murder. Neuschafer was then read his Miranda rights. He indicated that he understood his rights, did not request an attorney, and proceeded to give an incriminating statement eventually introduced into evidence at trial. Based on the district court's findings, Judge Kennedy found for the panel that the conditions of Edwards v. Arizona were satisfied and that the confession was admissible.[39/] The court denied habeas relief.

C. Double Jeopardy

The double jeopardy clause of the Fifth Amendment guarantees that no person will twice be required to defend himself against accusations regarding the same crime. Judge Kennedy has often limited the doctrine, generally taking a narrow approach, especially where the offense in question is a serious felony.

39/ Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987).

In Brimmage v. Sumner,[40] a state court convicted Brimmage of robbery and felony first-degree murder. He was sentenced to life imprisonment without the possibility of parole for the murder and to a concurrent 15-year sentence for the robbery. He contended in his habeas corpus petition that the robbery sentence constituted a multiple punishment for the same offense and should be overturned.

Although Judge Kennedy conceded that such a punishment normally constitutes double jeopardy, his opinion for the court found no violation here. Citing Supreme Court precedent for the proposition that where the legislative record clearly indicates an intent to impose cumulative punishments, such imposition does not offend the double jeopardy clause,[41] he then deferred to a series of Nevada Supreme Court decisions suggesting that the Nevada legislature intended multiple punishments for the defendant's crimes.[42] In so finding, Judge Kennedy conceded that those Nevada decisions did not explicitly state such an intent, but only that it was reasonably inferable. In a strong dissent, Judge Boochever stated that there is no "indication that the

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40/ 793 F.2d 1014 (9th Cir. 1986).

41/ Missouri v. Hunter, 459 U.S. 359, 368-69 (1983).

42/ Brimmage, 793 F.2d at 1015-16.

Nevada Legislature intended that multiple punishment be imposed, or, indeed, even considered that issue."[43/]

Judge Kennedy's disturbing dissent in Adamson v. Ricketts,[44/] an important double jeopardy decision, is based on a legally defensible but morally dubious stance. Charged with a car-bombing murder, Adamson entered into a plea agreement under which he would testify against two other individuals and plead guilty to second degree murder with actual incarceration time of 20 years. A superior court judge accepted the plea, and Adamson cooperated fully. On the basis of his testimony, the other defendants were convicted of first degree murder.

While their convictions were pending on appeal, Adamson's sentence was imposed. When the other defendants' convictions were reversed and remanded for new trials, the state sought to secure Adamson's testimony at the new trials. He refused, saying he had met his obligation and requested additional consideration. In response, the state, treating Adamson as having breached his plea agreement, prosecuted and convicted him for first degree murder.

43/ Id. at 1017.

44/ 789 F.2d 722 (9th Cir. 1986) (en banc), rev'd, 107 S. Ct. 2680 (1987).

The state argued that this did not constitute double jeopardy because the first conviction was for second degree murder while the second was for first degree murder. A majority in the Ninth Circuit soundly rejected that approach. If accepted, the court noted, such reasoning would entirely vitiate double jeopardy clause protection.

Judge Kennedy dissented, arguing that the protection of the clause does not extend where a plea-based conviction is properly set aside. He went on to say:

> The defendant took a risk not without some attractions for him. He was serving a twenty-year sentence. If the state elected to try him for first degree murder, conceivably he might have won an acquittal. It is hardly surprising that one as depraved as Adamson would shrink from a breach of contract and a gamble on the results. The court errs in not recognizing his defiance for what it is.[45/]

Judge Kennedy's dissent is insensitive to fundamental notions of inherent unfairness that the majority intuitively discerned in the state's treatment of Adamson.

On appeal, the Supreme Court reversed the en banc majority, though on the narrower ground that Adamson waived

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45/ 789 F.2d at 749.

his claim by the terms of his agreement.[46/] Four members of the Court sharply dissented.

D. The Rights to Counsel and to Confront Prosecution Witnesses

Judge Kennedy's opinions demonstrate a very conservative approach to both the Sixth Amendment right to counsel and to confront and cross-examine witnesses. He has been unsympathetic to appeals based on complaints of ineffective assistance of counsel, and joined in a dissent from a ruling that expanded the rights of prisoners suspected of committing crimes while in prison. Judge Kennedy has also held that the admission of video-taped testimony of a witness who died before he could be cross-examined by a murder defendant did not violate the confrontation clause.

1. Judge Kennedy Exhibits a Conservative View of the Right to Counsel.

In United States v. Gouveia,[47/] the majority of an en banc panel held that where a federal prisoner is suspected of committing a crime while in prison and is placed in administrative detention pending trial, he is constitutionally

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46/ 107 S. Ct. 2680 (1987).

47/ 704 F.2d 1116 (9th Cir. 1983) (en banc), rev'd, 467 U.S. 180 (1984).

entitled to an attorney prior to an indictment. The majority distinguished the circumstances in a prison case from those in which the Supreme Court had held that the right to counsel does not attach until adversary proceedings are initiated (i.e., at indictment or preliminary hearing). The majority ruled that if an inmate is held after the maximum disciplinary period has expired (90 days), he should be allowed an attorney to assist him in the preparation and preservation of a defense.

The dissent, in which Judge Kennedy joined, called the majority's ruling an "unprecedented expansion of the right to counsel"[48/] and reiterated that the right to counsel attaches only when adversarial judicial criminal proceedings are initiated. Citing numerous instances in which the Supreme Court has declined to extend the right to counsel to indigent suspects, the dissent concluded that the "extraordinary safeguard of the right to counsel is unnecessary to protect against such abuse. Suspects are amply protected by the 'ethical responsibility' of the prosecutor and due process standards."[49/] The Supreme Court agreed with the

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48/ Id. at 1127 (Wright, J., dissenting).

49/ Id. at 1128 (Wright, J., dissenting) (citing United States v. Ash, 413 U.S. 300, 320-21 (1973)).

dissent and reversed the majority's decision, ruling that the prisoners were not entitled to appointment of counsel until adversarial judicial proceedings had been initiated against them.[50/]

In Portland Police Ass'n v. City of Portland,[51/] Judge Kennedy ruled for the court and used procedural grounds to decline addressing the constitutionality of a departmental order requiring police officers to prepare reports after "major incidents" with no guarantee that the officers would have the right to consult with an attorney. Finding that because no officer had yet suffered injury due to the order, Judge Kennedy held that the complaint failed to present a justiciable controversy and should be dismissed for lack of jurisdiction. The court vacated a district court ruling on the merits of the case against the plaintiffs. Judge Reinhardt, in dissent, argued that a court should address the "serious and substantial" constitutional question presented.[52/] While this case was decided on procedural grounds, it reflects a hesitancy on the part of Judge Kennedy to provide relief to those seeking to assert the right to counsel.

50/ United States v. Gouveia, 467 U.S. 180 (1984).

51/ 658 F.2d 1272 (9th Cir. 1981).

52/ Id. at 1276 (Reinhardt, J., dissenting).

2. Judge Kennedy Has Been Unsympathetic to Claims of Ineffective Assistance of Counsel.

Defendants' appeals based on claims of ineffective assistance of counsel have failed to sway Judge Kennedy. In United States v. Medina-Verdugo,[53/] Judge Kennedy wrote for the court that while the Sixth Amendment requires that suspects be afforded reasonably competent and effective representation, "counsel need not be infallible."[54/] Id. at 653. Kennedy determined that the defendants' trial counsel had a reasonable basis for the tactics he employed at trial and labeled the defendants' contention "unconvincing." Kennedy reached a similar decision earlier, in Greenfield v. Gunn,[55/] where he affirmed the denial of a writ of habeas corpus based on a claimed deprivation of effective assistance of counsel -- an alleged failure by defendant's attorney to explore a potential defense.

Judge Kennedy has written that the Sixth Amendment right to counsel does not afford the right to representation

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53/ 637 F.2d 649 (9th Cir. 1980).

54/ Id. at 653.

55/ 556 F.2d 935 (9th Cir. 1977), cert. denied, 434 U.S. 928 (1977).

by a non-lawyer of the defendant's choice.[56/] He also would apparently defer to the observations of the trial court on questions of the competence of the trial attorney.[57/]

Judge Kennedy's approach to the effective assistance of counsel issue appears to be within the regime established by the Supreme Court in Strickland v. Washington,[58/] which was decided after the decisions written by Judge Kennedy above. Strickland held that a defendant must show that counsel's assistance was not within the range of competence demanded of counsel in criminal cases and that the defendant suffered actual prejudice as a result.

3. Judge Kennedy Is Reluctant to Recognize Claims Involving the Right to Confront and Cross-Examine Witnesses

In Barker v. Morris,[59/] Judge Kennedy held that admission of the videotaped testimony of a witness who subsequently died did not violate the confrontation clause where the testimony in the murder trial was necessary and

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56/ United States v. Wright, 568 F.2d 142 (9th Cir. 1978).

57/ Satchell v. Cardwell, 653 F.2d 408, 414 (9th Cir. 1981) (Kennedy, J., concurring), cert. denied, 454 U.S. 1154 (1982).

58/ 466 U.S. 668 (1984).

59/ 761 F.2d 1396 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986).

possessed particular guarantees of trustworthiness. The witness, a Hell's Angel member dying of throat cancer, testified against several suspects on videotape. Defense counsel for those suspects in custody at the time conducted extensive cross examination, all of which was recorded on the videotape. Defendant Barker, a fugitive at the time of the hearing, had no attorney present at the videotaping. Barker was subsequently arrested, tried, and convicted of murder in a state trial in which the videotape was presented as evidence. A state appellate court later held the videotape inadmissible under California's evidence code, but upheld the conviction on "harmless error" grounds.

In reviewing the petition for habeas corpus, the Ninth Circuit panel addressed directly whether the introduction of the videotape violated the Sixth Amendment confrontation clause. Judge Kennedy analyzed the confrontation clause in terms suggesting its sole purpose is to ensure accuracy, and diminished the importance of cross-examination by the defendant. He wrote that the videotaped testimony was analogous to several well-established hearsay exceptions, but one his analogies, the "dying people don't lie" rule, is much-criticized, and the state courts had specifically held that the videotape was <u>inadmissable</u> hearsay. Furthermore, he implied that the defendant did not deserve his Sixth Amendment rights, noting that any lack of opportunity to cross examine

the witness was "directly attributable to Barker's fugitive status."[60/] Judge Kennedy also noted that the tape was strongly supported by independent corroboration for each of its essential elements, and the witness had been subjected to extensive cross examination by other defense attorneys.[61/] The court found no violation of the confrontation clause.

Judge Kennedy will grant confrontation clause relief where the facts are compelling. In Chipman v. Mercer,[62/] the trial court refused to permit cross-examination for bias by the defendant Chipman of the sole eyewitness to the burglary of which he was accused. When counsel undertook to cross-examine the witness on the subject of her known dislike for a relative of defendant and her possible hostility to defendant, the trial court did not permit the questions to proceed. The district court granted a habeas petition, and Judge Kennedy's opinion affirmed the district court.

At the outset, Kennedy announced that confrontation questions must be treated on a case-by-case basis. In his view, "the confrontation clause applies to the essentials of

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60/ Id. at 1400.

61/ Id. at 1402.

62/ 628 F.2d 528 (9th Cir. 1980).

cross-examination, not to all the details of its implementation,"[63] and, as such, the clause "should not become the source of a vast and precise body of constitutional common law."[64] He also would grant broad deference to trial court rulings.[65]

On the facts of this case, Judge Kennedy believed that the potential bias was of sufficient import that reversal was required. Weighing the crucial significance of this eyewitness' testimony, and the reasonable likelihood that the alleged bias may have existed and may have impacted on the witness' truthfulness, Judge Kennedy felt constrained to rule in the defendant's favor. He commented in closing that the seeming harshness of a rule requiring reversal where a confrontation clause error is established is diminished by the fact that such error is only establishable where the violation prevents cross-examination in an area of particular relevance, that is, where the error is likely to have materially affected the outcome of a trial.[66]

63/ Id. at 531.

64/ Id. at 531.

65/ Id.

66/ Id. at 533.

In Burr v. Sullivan,[67/] Judge Kennedy held for the court that a habeas petitioner was denied his Sixth Amendment right to confrontation when the state trial court prohibited his attorney from cross-examining a prosecution witness about possibly impeaching circumstances. The Sixth Amendment included the right to cross-examine the witnesses as to their possible bias or self-interest in testifying. Judge Kennedy held that the defendant's need to cross examine principal government witnesses about burglaries to which they had admitted in prior juvenile proceedings outweighed the need of the state to maintain confidentiality of its juvenile records, and thus the state trial court's striking of that cross examination was constitutional error.

67/ 618 F.2d 583 (9th Cir. 1980).

V

CAPITAL PUNISHMENT

Introduction

Judge Kennedy has had few cases involving capital punishment. He has demonstrated that he will not expand the constitutional requirements that ensure that capital punishment is imposed rationally. He has also demonstrated, however, that he is reluctant to affirm an improperly imposed death sentence on an "obviously" guilty defendant or deny that defendant habeas corpus review. Dicta in Judge Kennedy's capital punishment opinions suggest that he will narrowly interpret and apply those constitutional safeguards that ensure that only the most heinous murderers are executed.

Analysis

Judge Kennedy's most substantial capital punishment opinion is his separate opinion in Adamson v. Ricketts.[1/] There, Judge Kennedy joined a dissent and wrote a separate dissent that would have upheld a death sentence imposed on defendant Adamson for first degree murder, even though Adamson had previously pleaded guilty to second degree murder

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1/ 789 F.2d 722 (9th Cir. 1986) (en banc), rev'd, 107 S. Ct. 2680 (1987).

for the same crime and received a lengthy prison sentence. Adamson agreed to plead guilty to the noncapital crime in exchange for his testimony at other trials. The dissenters narrowed the double jeopardy clause of the Constitution which protects citizens from being tried twice for the same crime. The Supreme Court, in a five-four decision with Justice Powell in the majority, ultimately reversed the Ninth Circuit, but did not wholly adopt the reasoning of Judge Kennedy concerning double jeopardy.

Judge Kennedy's Adamson opinion represents an uncharacteristic foray into analysis not necessary to the resolution of a case.[2/] The Ninth Circuit divided on whether defendant Adamson's plea agreement constituted a waiver of double jeopardy protection. Judge Kennedy's separate dissent was initially premised on a theory that the jeopardy that attaches upon conviction based on a guilty plea is different than the jeopardy that attaches upon conviction based on a trial. According to Judge Kennedy, a defendant who breaches a plea agreement cannot invoke the double jeopardy clause as a bar to prosecution for an offense more serious than the one for which he was originally convicted. The Supreme Court reversed on the narrower ground that Adamson waived his

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2/ 789 F.2d at 747 (Kennedy, J., dissenting).

double jeopardy protection by the terms of his plea agreement. In sharp dissent, four members of the Supreme Court explained that Adamson had not violated his plea bargain and had not implicitly waived his double jeopardy rights.

In Adamson, Judge Kennedy used a cramped construction of the double jeopardy clause to affirm a death sentence imposed on a defendant who had complied with the terms of his plea bargain by testifying in fourteen court appearances in five separate cases resulting in seven convictions.[3/] For reasons not related to Adamson's testimony, two of these convictions were reversed after Adamson began serving his sentence. Adamson temporarily balked at retestifying, but subsequently offered to continue to testify. Judge Kennedy's double jeopardy analysis wholly ignored the fact that the state had substantially received the benefit of its bargain with Adamson and had previously determined that the death sentence need not be imposed.

Judge Kennedy's pronouncements on the double jeopardy clause that unduly restrict double jeopardy protection raise serious concerns. That he would make these pronouncements in a case involving life and death raises questions about the care he takes in such cases.

3/ See 107 S. Ct. at 2688 n.3 (Brennan, J., dissenting).

In two other cases, however, Judge Kennedy has demonstrated some sensitivity to the constitutional rights of those sentenced to death. But even in these cases, Judge Kennedy's statements on points of law not directly relevant to the disposition of the case suggest that he will limit the rights of the condemned.

In Vickers v. Ricketts,[4/] Judge Kennedy reversed a conviction for premeditated murder and vacated a death sentence where the jury had not been instructed that it could convict the defendant of a lesser noncapital offense of unpremeditated murder. Although Judge Kennedy noted that there was "abundant, clear, and persuasive" evidence that the murder was premeditated, the defendant had introduced some testimony that he suffered from a "brain disorder" that caused him to become uncontrollably violent.[5/]

In analysis not relevant to the court's holding, Judge Kennedy suggested that the defendant's failure to request jury instructions on the lesser noncapital offense might have prevented him from raising his claim in the federal courts if a state court had determined that his claim

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4/ 798 F.2d 369 (9th Cir. 1986), cert. denied, 107 S. Ct. 928 (1987).

5/ Id. at 371-72.

was procedurally barred from further consideration.[6] In a separate concurrence, Judge Reinhardt pointed out that, under Ninth Circuit precedent in similar circumstances, the Constitution required a trial court to inform the jury that it could return a conviction for a noncapital offense even if the defendant's attorney did not request such an instruction. Accordingly, failure to request such an instruction could not prevent federal court review of the error.[7] Judge Kennedy's erroneous suggestion that the fundamental right to have a jury consider an offense less than a capital one could be lost through procedural misstep is disturbing.

Similarly, in Neuschafer v. McKay,[8] Judge Kennedy reversed a lower court's refusal to hold an evidentiary hearing on a death row inmate's claim that his confession was involuntary and remanded the case for a hearing. Judge Chambers dissented from the remand on the grounds that there was no doubt that the death row inmate was guilty. After an evidentiary hearing, Judge Kennedy authored a second

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6/ Id. at 373.

7/ Id. at 374 (Reinhardt, J., concurring) (citing Miller v. Stagner, 757 F.2d 988, 993, modified, 768 F.2d 1090 (9th Cir. 1985), cert. denied, 106 S. Ct. 1269 (1986)).

8/ 807 F.2d 839 (9th Cir. 1987).

opinion affirming the federal trial court's finding that the defendant's confession was voluntary.9/

In analysis not necessary to the disposition of the second appeal, Judge Kennedy observed that even if the inmate could show that his sentence was harsher than those imposed for similar crimes, he would still not have established a claim for federal relief. This ruling limiting defendants' rights was not necessary to the disposition of the appeal.

9/ Id. at 374 (Reinhardt, J., concurring) (citing Miller v. Stagner, 757 F.2d 988, 993, modified, 768 F.2d 1090 (9th Cir. 1985), cert. denied, 106 S. Ct. 1269 (1986).

VI

FREEDOM OF SPEECH, FREEDOM OF THE PRESS, AND FOIA (the Freedom of Information Act)

Introduction

If confirmed by the Senate, Judge Kennedy may play a crucial role in the development of jurisprudence relating to many First Amendment concerns, especially freedom of speech and of the press. The importance of his role derives in part from Justice Powell's central position on these issues during his tenure. Justice Powell voted in the majority in all eleven First Amendment free speech cases decided by the Supreme Court during the 1986-87 term, and he provided the decisive, majority vote in six of those cases where the vote was 5-4, more than any other Justice.1/ Unfortunately, none of Judge Kennedy's opinions on First Amendment concerns provides a clear indication of his stance on the most difficult and controversial cases now reaching the Supreme Court.

Judge Kennedy has been generally supportive of the media in free press and libel decisions. The cases before him were generally uncontroversial, and decided by unanimous

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1/ Barnett, Free Speech in the New Court, ABA Journal, December 1, 1987, at 48.

panels, so this support may be the result of his strict adherence to settled precedents. Judge Kennedy is at times less supportive of First Amendment rights of free speech by individuals or organizations. If this portends a pattern in his opinions, it would limit the free speech rights of those with the least resources for publishing their views -- non-media speakers.

A. Freedom of Speech

Judge Kennedy has not had the opportunity to determine such issues as what constitutes a public forum and what are the boundaries of speech (i.e. where does speech end and unprotected behavior begin). Judge Kennedy, however, has at times determined that speech was outside of the guaranteed protection of the First Amendment. He has also ruled on several ancillary issues regarding obscenity.

In Singer v. United States Civil Service Commission,[2/] a federal government employee was fired for, among other things, being active in the Seattle Gay Alliance, displaying homosexual advertisements in his automobile window and publicly indicating his homosexuality. Judge Kennedy

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2/ 530 F.2d 247 (1976), judgment vacated and remanded in light of position of Solicitor General, 429 U.S. 1034 (1977).

joined in an opinion, supporting the termination, even though the employee had disclosed his homosexuality before he was hired. The employee alleged that the firing violated his First Amendment rights of free speech and association. The majority opinion ruled against the employee based on the government's right to regulate its workers. The Supreme Court vacated this opinion at the request of the government after the employing agency changed its regulations to prohibit blanket terminations of homosexual employees.[3/]

In another context, Judge Kennedy also ruled against the free speech rights of a government worker. In Kotwica v. City of Tucson,[4/] Kotwica, a city employee asked for and received permission to speak to a reporter on the condition that she would not discuss a particular subject, the development of a competitive gymnastics team in Tucson. When she spoke about the topic she was suspended for a day. Although Judge Kennedy, writing for the court, admitted that the comments were speech, he concluded that public employees' First Amendment rights must be balanced with the state's interest in a responsible and efficient governmental system. For Judge Kennedy, it was easy to reverse the grant of

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3/ 429 U.S. 1034 (1976).

4/ 801 F.2d 1182 (9th Cir. 1986).

summary judgment to the employee. Kotwica had misstated the government's position. The government's stake in having its position stated accurately so that the public can evaluate it was stronger than Kotwica's First Amendment rights, said Judge Kennedy. Therefore, Kotwica "could be disciplined not only because she was insubordinate but also because her speech disserved the first amendment interest of others [i.e. the government and the public]."[5/] How would Judge Kennedy have acted if Kotwica had accurately represented the government's position, thus furthering the government's and public's interest in awareness of the government position?

In Kotwica, Judge Kennedy relied upon two Supreme Court decisions, Connick v. Myers[6/] and Pickering v. Board of Education,[7/] but expanded the weight given to the government's interest so that the test was skewed in favor of the state. Aside from the fact that Kotwica was told not to speak on the topic, the case is indistinguishable from Pickering where the court said:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public

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5/ Id. at 1185.

6/ 461 U.S. 138 (1983).

7/ 391 U.S. 563 (1968)

> attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.[8/]

Hence Judge Kennedy went beyond Supreme Court precedent to deny First Amendment rights.

Outside the governmental context, Judge Kennedy would have denied free speech rights of a worker who spoke against union leadership. In a labor law case, a panel of the Ninth Circuit ruled that sections 411 and 412 of Title 29 of the United States Code protect the speech rights of an elected official of a union so that he could not be fired from his job, even though kept as a union member, for expressing views in opposition to the union leadership.[9/] The panel distinguished Finnegan v. Leu[10/] which denied these

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8/ 391 U.S. at 572-73 (footnote omitted).

9/ Lynn v. Sheet Metal Workers' Int'l Ass'n, 804 F.2d 1472 (9th Cir. 1986), petition for cert. filed, 56 U.S.L.W. 3029 (U.S. June 4, 1987) (No. 86-1940).

10/ 456 U.S. 431 (1982).

rights to appointed officials. Judge Kennedy dissented from this part of the holding, stating that Finnegan controlled, that federal judges should exercise restraint with respect to internal union affairs, and that there is no protection if union officials must "'choos[e] between their rights of free expression ... and their jobs.'"[11/]

Judge Kennedy found no free speech rights in a criminal tax case. In United States v. Freeman,[12/] Freeman claimed as defense to a charge that he had aided and abetted violation of the tax laws the fact that he had only advocated tax noncompliance and that this was speech protected by the First Amendment. Judge Kennedy stated that the First Amendment did not bar prosecution but conceded where there is some evidence that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a First Amendment defense would be a legitimate matter for the jury's consideration. Writing for the court, he affirmed the convictions on two counts where the court felt no First

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11/ 804 F.2d at 1486 (Kennedy, J., concurring and dissenting) (quoting Finnegan v. Leu, 456 U.S. at 437, quoting Retail Clerks Union Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012, 1021 (D.D.C. 1969)).

12/ 761 F.2d 549 (9th Cir. 1985), cert. denied, 106 S. Ct. 1982 (1986).

Amendment activity was implicated but reversed twelve counts where the court should have instructed the jury on the issue.

Judge Kennedy addressed the issue of obscenity only indirectly in United States v. Sherwin;[13/] In this case, a magistrate ordered the seizure of a shipment of allegedly obscene materials after receiving an affidavit describing the shipment and specifying that the shipment included an allegedly obscene magazine, Private No. 8, whose contents were described in the affidavit. Judge Kennedy held for the en banc court that no prior adversarial hearing was necessary, even though materials arguably protected by the First Amendment were to be seized. Instead, following Heller v. New York,[14/] all the Constitution required was a personal examination and determination of probable cause for obscenity by a neutral magistrate. The defendants are entitled to a hearing after the seizure, but Judge Kennedy was silent on what constitutes obscene material and how a magistrate should evaluate materials.

In a footnote in Sherwin, Judge Kennedy observed that when materials are seized in violation of the First Amendment, the appropriate remedy is the return of the seized

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13/ 539 F.2d 1 (9th Cir. 1976) (en banc).

14/ 413 U.S. 483 (1973).

property, but not its suppression as evidence.[15/] However, in a related case,[16/] where Judge Kennedy sat on the panel and concurred in the result, the court held that other magazines seized simultaneously with Private No. 8 were improperly seized because they were not identified in the search warrant. Since these magazines were arguably protected by the First Amendment, the nexus and plain view exceptions to the Fourth Amendment prohibitions against unreasonable searches and seizures were irrelevant. As a result, both the police officer's affidavit to the magistrate and the magistrate's seizure order must be specific to prevent police officers from making ad hoc determinations of obscenity.

In a difficult decision regarding political contributions, Judge Kennedy agreed that Congress could limit the contributions. In California Medical Ass'n v. Federal Election Comm'n,[17/] Judge Kennedy upheld for the en banc court the constitutionality of the Federal Election Campaign Act (the "FEC") from challenges that its limitation on

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15/ 539 F.2d at 8 n.11.

16/ United States v. Sherwin, 572 F.2d 196 (9th Cir. 1977), cert. denied, 437 U.S. 909 (1978) (Sherwin II).

17/ 641 F.2d 619 (9th Cir. 1980) (en banc), aff'd, 453 U.S. 182 (1981).

contributions to a political action committee ("pac") infringed First Amendment rights. The Supreme Court had previously held that it was constitutional to limit individual contributions to candidates. Judge Kennedy concluded that if persons could make unlimited contributions to pacs, which in turn could make contributions to candidates, the limitation an individual contributions to candidates could easily be evaded. Relying on Buckley v. Valeo,[18/] Judge Kennedy indicated that such contributions, unlike limitations on expenditures, are really symbolic acts of support rather than articulation of ideas. Limitations on contributions do not significantly diminish the effectiveness or quantity of speech since the FEC does not foreclose unlimited spending by individuals on their own. However, as Judge Wallace observed in partial dissent, the limitations upon contributions to candidates by individuals is intended to thwart the corruptive quid pro quo of a direct gift to a candidate; this concern is irrelevant with a contribution to a pac.

Some of Judge Kennedy's cases raise concerns about his willingness to restrict rights of free speech. He has several times gone beyond Supreme Court precedent to do so.

18/ 424 U.S. 1 (1976) (per curiam).

B. Freedom of Speech vs. State and Local Laws

In two cases touching free speech issues Judge Kennedy has sought to block the requested relief by invoking strict application of abstention principles, whereby the federal court dismissed the case and relegated the plaintiff to state court proceedings.

In World Famous Drinking Emporium, Inc. v. City of Tempe,[19/] the owner of a go-go dancing club challenged zoning and nuisance laws as violative of his civil rights under the Federal Constitution. Prior to commencing the federal action, the owner had sued and had been sued by the City of Tempe in the state courts. The majority affirmed the dismissal of the federal suit on abstention grounds, under Younger v. Harris[20/] which permits federal courts to abstain when: there are on-going state proceedings; important state interests are implicated; and there is an adequate opportunity to raise federal issues in the state proceedings. Judge Kennedy concurred in the judgment, stating that Younger and the related Huffman v. Pursue, Ltd.[21/] controlled.

19/ 820 F.2d 1079 (9th Cir. 1987).

20/ 401 U.S. 37 (1971).

21/ 420 U.S. 592 (1975).

In a different municipal ordinance case concerning billboards, Judge Kennedy wrote for a unanimous court that the federal statute under which the advertiser sought relief did not create a private right of action. Ordinarily the court could then stop and remand the case, as it did, to see if the advertiser might also win on its state law claims. However, the court through Judge Kennedy raised on its own the question whether abstention was appropriate under another line of Supreme Court cases. The court left this issue open, but it implicitly forced the issue in the district court during the proceedings on remand.[22/]

Hence, in two cases, Judge Kennedy used a procedural ground -- abstention -- to decline to rule on First Amendment rights.

C. Rights of the Press and Libel Law

In contrast to the Free Speech cases above, Judge Kennedy has generally shown himself sympathetic to the media, protecting it from prior restraints and the chilling effects of libel suits. He does not think courts should interfere with their editorial function and grants them deference.

22/ National Advertising Co. v. City of Ashland, 678 F.2d 106 (9th Cir. 1982).

For example, in Goldblum v. National Broadcasting Corp.,[23] Goldblum, who had been imprisoned for his participation in a securities fraud, attempted to enjoin NBC from televising a film about him. Goldblum argued that the film would jeopardize his release on parole and his right to a fair trial in a pending civil action. Judge Kennedy held for the court that a district court's order to submit the film for prior review was a prior restraint and therefore presumptively unconstitutional. Judge Kennedy supported the fundamental principle of the First Amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place in strong language writing:

> We find no authority which is even a remote justification for issuance of a prior restraint . . . . The order not only created a reasonable apprehension of an impending prior restraint, it was also a threatened interference with the editorial process.[24]

Judge Kennedy has also ruled in favor of the press in libel cases. In Church of Scientology of California v. Adams,[25] the Church of Scientology of California sued a St.

23/ 584 F.2d 904 (9th Cir. 1978).

24/ Id. at 906-07.

25/ 584 F.2d 893 (9th Cir. 1978).

Louis newspaper for libel regarding a series of articles about Scientology. The action was brought in California although the newspaper's contact with California was minimal. Less than 200 copies of the newspaper reached California. Judge Kennedy concluded for the court that this contact was insufficient to make it appropriate for a court in California to hear the case. Conceding that copies of most major newspapers will be found throughout the world, Judge Kennedy stated that he did not "think it consistent with fairness to subject publishers to personal jurisdiction solely because an insignificant number of copies of their newspapers were circulated in the forum state."[26/] He therefore affirmed the district court's dismissal. Judge Kennedy cited no support for this proposition, which is inconsistent with Buckley v. New York Post Corp.[27/] and Anselmi v. Denver Post, Inc.[28/]

Instead, according to Judge Kennedy, the test for defamation jurisdiction was "whether or not it was foreseeable that a risk of injury by defamation would arise in the

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26/ Id. at 897.

27/ 373 F.2d 175 (2d Cir. 1967) (which Judge Kennedy does not mention).

28/ 552 F.2d 316 (10th Cir. 1977), cert. denied, 432 U.S. 911 (1977).

forum state." In a conclusory statement, he decided it was unforseeable.

In another libel decision, Judge Kennedy also ruled in favor of the press. In Koch v. Goldway,[29/] the mayor of Santa Monica attacked Ilse Koch, a German national and opponent of the mayor, by allegedly saying "there was a well-known Nazi war criminal named Ilse Koch during World War II. Like Hitler, Ilse Koch was never found. Is this the same Ilse Koch?" Asserting that a statement is defamatory only if it is a statement of fact (and not merely an opinion), Judge Kennedy concluded for the court that the statement was not factual since the plaintiff had been born in the 1940s' and thus could not be the war criminal. Instead the mayor's statement was only a vicious slur and thus not libel. Despite apparent disgust toward the mayor, Judge Kennedy concluded that the plaintiff had no redress and agreed with the district court that summary judgment for Goldway was proper.

In another of Judge Kennedy's media decisions, Judge Kennedy ruled that CBS had a right of access to documents filed in connection with criminal proceedings. Judge Kennedy conceded that the press's right of access has limits.

29/ 817 F.2d 507 (9th Cir. 1987).

Private property interests and the right to a fair trial might overcome the right to access, but the interests opposing access must be specified with particularity and the denial of access must be narrowly tailored to serve that interest. However, in the instant case the government had not done this, and the court issued the requested writ of mandamus.[30/]

Overall Judge Kennedy has supported First Amendment rights of the press.

D. Commercial Speech

Judge Kennedy has recognized that limitations on the speech rights of businesses raise First Amendment concerns. In FTC v. Simeon Management Corp.,[31/] he wrote a unanimous opinion affirming the denial of a preliminary order banning unfair and deceptive practices by Simeon pending a final resolution of the FTC's contentions. Simeon ran several weight-loss centers whose clients used a legal drug as part of the program, even though the FDA had not specifically approved the drug for that purpose. The opinion emphasized the narrow scope of appellate review of such an

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30/ CBS, Inc. v. United States Dist. Court, 765 F.2d 823 (9th Cir. 1985).

31/ 532 F.2d 708 (9th Cir. 1976).

order and noted the necessity of judicial review of any FTC determination affecting First Amendment rights. He also argued that it was dangerous to ban speech relating to underlying activities that are themselves legal.

In another case the FTC found false some advertising for a gasoline additive and broadly banned future deceptions by the advertising agency that produced the advertisements and the oil company that manufactured the product. A unanimous opinion by Judge Kennedy affirmed the FTC findings but narrowed the order to the particular product reviewed. To allow the FTC to review all future claims by either company regarding any product they promote, wrote Judge Kennedy, amounts to an oppressive prior restraint on protected speech.[32/]

E. Freedom of Information Act (FOIA)

Judge Kennedy has limited FOIA when confronted with conflicting statutes. In United States v. United States District Court,[33/] John DeLorean had made a FOIA request for documents relating to his activities. Judge Kennedy held for a unanimous court that, because DeLorean was a criminal

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32/ Standard Oil Co. of Calif. v. FTC, 577 F.2d 653 (9th Cir. 1978).

33/ 717 F.2d 478 (9th Cir. 1983).

defendant at the time and the documents were for his defense, he was limited by the requirements of Rule 16 of the Federal Rules of Criminal Procedure specifying the discovery permissable in criminal cases. Judge Kennedy wrote that FOIA could not be used as an alternative discovery mechanism. Therefore, the court vacated the district's order to supply the information. This decision places a restriction on FOIA requests not stated in the statute and hampers the ability of any criminal defendants to discover the nature of the charges against them.

On the other hand, in Long v. IRS,[34/] Judge Kennedy wrote for a unanimous panel rejecting various objections by the IRS to information requests in order to fulfill the stated congressional policy mandating the fullest possible disclosure. Burden on the government, as long as not totally unreasonable, was irrelevant. When the IRS still refused to comply, Judge Kennedy joined a unanimous opinion reversing the district court and ordering compliance by an injunction.[35/] In a concurrence joined by the other members of the

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34/ 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980).

35/ Long v. IRS, 693 F.2d 907 (9th Cir. 1982).

panel, Judge Kennedy properly reprimanded the IRS for its dilatory litigation tactics.

VII

FREEDOM OF RELIGION

Introduction

Judge Kennedy's record on the religion clauses of the First Amendment is extremely limited. Judge Kennedy has had only two cases that directly implicate First Amendment issues. While Judge Kennedy has sat on a few additional panels that raised issues relating to the religion clauses, these issues were not central to those decisions.

Due to the paucity of decisions, it is impossible to discern Judge Kennedy's views in this area. Further, Judge Kennedy has not enunciated a systematic approach to interpretation and application of the religion clauses but instead addresses these issues on a case by cases basis. Perhaps because he has not developed a methodology, Judge Kennedy follows precedent closely. Judge Kennedy's predelictions as a Supreme Court Justice, when he is less bound by precedent, or when confronted with a case of first impression, are difficult to discern.

Analysis

Judge Kennedy's most notable opinion is Graham v. Commissioner of Internal Revenue Service.[1/] In Graham, members of the Church of Scientology ("the Church") appealed a decision of the United States Tax Court that they were not entitled to deduct from their taxes as charitable donations certain payments made to the Church. Church members argued that denial of certain charitable contribution deductions violated their rights under the free exercise and establishment clauses of the First Amendment. These clauses state: "Congress shall make no law respecting on establishment of religion or prohibiting the free exercise thereof." Additionally, the Church members alleged that the Commissioner had selectively enforced the tax laws against them, and not against other churches.

The Tax Court found that, as part of its religious training, the Church provided numerous services to its adherents in a commercial manner. The Tax Court held that payments made by Church members to the Church were not contributions or gifts but, rather, transfers made with the expectation of receiving a commensurate gift in return.

1/ 822 F.2d 844 (9th Cir. 1987).

Three issues were raised on appeal: (1) did the payments to the Church qualify for treatment as charitable deductions under the Internal Revenue Code; (2) was there a free exercise violation; and (3) was there selective enforcement of the laws against the Church.

Relying on recent Supreme Court precedent,[2/] Judge Kennedy, writing for the court, held that where a contributor "expects a substantial benefit in return, then the contribution cannot be deducted."[3/] Because the facts in Graham evidenced an expectation, a quid pro quo, of some service from the church, the payments to the Church were not entitled to charitable deduction treatment under I.R.C. § 170.

Addressing the free exercise issue, Judge Kennedy, again relying on explicit Supreme Court precedent, held that to show a free exercise violation, the Church member has the burden of demonstrating that a "governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in

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2/ United States v. American Bar Endowment, 477 U.S. 105 (1986).

3/ 822 F.2d at 849.

conduct or having a religious experience which the faith mandates."[4/] Judge Kennedy reasoned that the fact that government does not "subsidize" a religious practice does not "create a burden" on the free exercise of religion.[5/] Moreover, Judge Kennedy held that the government was a compelling state interest in promoting charitable gifts and contributions and in the maintenance of a uniform tax system. This interest justified any possible burden on the exercise of the taxpayers' religion.

Judge Kennedy's opinion easily dispensed with the appellant's establishment clause argument by pointing out the neutral application of I.R.S. rules for charitable deductions and, even assuming that the tax law, although neutral in its purpose, "has the effect of treating Scientologists more harshly than other religions, this disparate effect is not unconstitutional, for the reason that the government has a sufficient and compelling justification for its rule, in the context of tax law."[6/]

In his second substantive religion case, International Association of Machinists & Aerospace Workers

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4/ Id. at 850-51.

5/ Id. at 852.

6/ Id. at 853.

v. Boeing Co.,[7] Judge Kennedy joined an opinion addressing the accommodation of religion in the workplace. Boeing Co. was only the second Court of Appeals decision to consider these issues after the Supreme Court's decision in Estate of Thornton v. Caldor, Inc.[8] which struck down a Connecticut law requiring employers to respect any Sabbath day off requested by employees.

In Boeing Co., Nichols, a Boeing employee, refused to join the Machinists Union, which was required for her job. Nichols asserted that union membership and support of labor organizations were contrary to her religious convictions. Instead she offered to contribute a sum equal to her union dues to charity. The Machinists union rejected the offer and requested that she be discharged. Boeing asserted that discharge would violate the discrimination laws -- Title VII -- which require employers to take reasonable steps to accommodate the religious beliefs of their employees.[9]

Relying on Ninth Circuit and Supreme Court precedent, the court in Boeing, joined by Judge Kennedy held that

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7/ Nos. 86-4345, 86-4373 (9th Cir. Nov. 27, 1987) (LEXIS, Genfed library, Usapp file).

8/ 472 U.S. 703 (1985).

9/ 42 U.S.C. § 2000e(j).

substitution of a charitable contribution in lieu of joining or supporting a labor union was a reasonable accommodation under the discrimination laws.

The court further held the provisions of the discrimination laws were constitutional under the establishment clause of the First Amendment because they were enacted to promote the secular purpose of prohibiting discrimination in the workplace. The substituted charity allows the adherent to work without violating his religious beliefs and without increasing or decreasing the advantages of membership in a religious faith; and the accommodation would not result in excessive governmental entanglement with religion because a court's only task is to determine the sincerity of the adherent's beliefs. In reaching this conclusion, the court relied on the Lemon v. Kurtzman,[10/] test repeatedly embraced by Supreme Court precedent.

The court in Boeing Co. correctly distinguished Estate of Thornton v. Caldor, Inc., a recent Supreme Court opinion invalidating a Connecticut law requiring an unqualified accommodation to an employee, on the ground that there was a complete failure to take into account the interests of the employer and other employees in accommodating the

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10/ 403 U.S. 602 (1971).

religious adherent, while in Boeing, the employer's concerns were considered. The court in Boeing Co. reasoned that if there had been a greater hardship upon the union, through a widespread refusal to pay union dues, for example, the charitable contribution might have been disallowed.

VIII

PRISONERS' RIGHTS

Introduction

Judge Kennedy has decided very few cases involving prisoners' rights -- prisoners' civil suits for damages or to obtain better conditions in prisons. In these few decisions he relies heavily on prior precedent, where available. He will support the prisoners' claims when presented with facts clearly indicating official misconduct. But he appears unwilling to expand legal doctrines to allow prisoners greater rights than those previously established. He has also restricted prisoners' rights based on unduly narrow readings of procedural rules.

Analysis

Judge Kennedy at times is reluctant to decide prisoners' rights cases, when he can avoid doing so on procedural grounds. For example, in Wiggins v. Rushen,[1/] Judge Kennedy denied as moot a claim of a former maximum security prisoner regarding allegedly undue restrictions on his access to a prison law library. The prisoner has been transferred from a maximum security facility to a vocational

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1/ 760 F.2d 1009 (9th Cir. 1985).

school while his suit was pending. Judge Kennedy decided that this mooted the Claim, vacating the lower court's injunction requiring better access to the library.

In deciding the mootness issue Judge Kennedy used the traditional test of whether the issue was "capable of repetition yet evading review." Judge Kennedy, rejecting the possibility that the prisoner could be transferred or convicted again, stated that the case was moot because there was no reasonable expectation that the claimant would be subjected to the same action again.[2/] He further held that the claim was not one that would evade review because it had been reviewed in the prisoner's suit for damages and other prisoners could bring it. He further stated that the exception was limited to extraordinary cases where the challenged action is of limited duration.[3/] The dissent, written by Judge Fletcher, criticized Judge Kennedy for not remanding the case to the trial court for fact finding to determine the applicability of this fact-based exception to the mootness bar.[4/] The dissent noted the possibility that prisoners may be transferred after claims are brought and that maximum

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2/ Id. at 1011.

3/ Id.

4/ Id. at 1012.

security is often of limited duration, thus making claims less likely to be reviewable.[5/] Judge Fletcher further stated that it was not "absolutely clear," as the Supreme Court requires, that there was no reasonable expectation of repetition because the prisoner was in fact awaiting trial on charges brought against him while on parole.[6/] Judge Kennedy's interpretation of the mootness doctrine was unduly narrow and not required by Supreme Court precedent.

In another case, Judge Kennedy took a middle ground between upholding prisoners' rights and denying them. In Spain v. Procunier,[7/] Judge Kennedy modified the lower court's finding that certain practices of the San Quentin prison guards violated the inmates' constitutional rights. These practices included the use of tear gas to remove uncooperative prisoners from their cells, the requirement that the prisoners wear various mechanical restraints, and a denial of outdoor exercise. On the one hand, while Judge Kennedy's opinion upheld the lower court's finding that the denial of outdoor exercise violated the Eighth Amendment, and

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5/ Id. at 1013.

6/ Id. at 1012 (quoting Vitek v. Jones, 445 U.S. 480, 487 (1980)).

7/ 600 F.2d 189 (9th Cir. 1979).

modified the lower court's ruling to enjoin the Department of Corrections from violating their new regulations regarding mechanical devices.[8/] On the other hand, Judge Kennedy finding a split in the precedents regarding tear gas, decided to allow its use in certain circumstances, and remanded the case to the district court for the formulation of specific standards.[9/] Judge Kennedy permitted the use of low doses of tear gas on prisoners in their cells, despite allegations that it caused anguish to prisoners in adjacent cells who were cooperating with prison officials.

In addition, Judge Kennedy has several times upheld the rights of prisoners when he found obvious official misconduct. For example, in Jones v. Taber,[10/] a convicted felon awaiting sentencing in prison was taken from his cell, stripped, gagged, bound, chained to a wall, doused with cold water, and beaten with a night stick for three to five hours. He was then put into a special segregation facility for 19 days and subsequently signed a release of his civil rights claims. Judge Kennedy, reversing and remanding summary judgment, ruled in favor of the prisoner. He held that the

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8/ Id. at 199.

9/ Id. at 196.

10/ 648 F.2d 1201 (9th Cir. 1981).

voluntariness of the release was to be determined with reference to the coerciveness of atmosphere, including the factors of a lack of counsel, the prisoner's testimony that his refusal to sign would lead to harsher treatment, a minimal attempt to explain nature of waiver, and the prisoner's placement in special segregation for over two weeks before the release was offered. Judge Kennedy did note that voluntariness did not require the presence or assistance of counsel although the lack of it was a consideration.[11/]

In another case of particularly egregious official misconduct, Judge Kennedy also ruled in favor of the prisoner. In Bouse v. Bussey,[12/] Judge Kennedy joined in a per curiam decision reversing the district court's dismissal of a prison inmate's suit against prison guards for forceably taking a sample of the inmate's pubic hair without a warrant. The decision found that while "some investigative procedures designed to obtain incriminating evidence from the person are such minor intrusions upon privacy and integrity that they are not generally considered searches or seizures"[13/] for Fourth Amendment purposes, the "painful and humiliating

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11/ Id at 1205.

12/ 573 F.2d 548 (9th Cir. 1977) (per curiam).

13/ Id. at 550.

invasion upon the most intimate parts of [plaintiff's] anatomy"[14/] were subject to constitutional protections. The court, citing United States v. Cameron,[15/] held that a search, in order to comport with the Fourth Amendment reasonableness requirement, must minimize emotional and physical trauma.[16/] Finding that the search at issue did not meet that standard, the court reversed and remanded.

Another example of Judge Kennedy supporting prisoners' rights is Akao v. Shimoda.[17/] There he joined a per curiam opinion reversing the trial court's dismissal of a complaint by prisoners without a lawyer ("pro se" complaint) that alleged that prison overcrowding violated the prisoners' right to be free from cruel and unusual punishment. The prisoners alleged that due to population increase, there was an increase in stress, tension, communicable diseases and confrontations between inmates. The lower court held that the prisoners failed to state a claim under the Eighth Amendment. The Ninth Circuit held that while it is true that the

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14/ Id.

15/ 538 F.2d 254, 258 (9th Cir. 1976).

16/ 573 F.2d at 550.

17/ 820 F.2d 302 (9th Cir. 1987) (per curiam), language modified, 832 F.2d 119 (9th Cir. 1987).

allegation of overcrowding without more does not state a claim under the Eighth Amendment, the complaint had alleged more than this and should not have been dismissed without permitting the prisoners the opportunity to file an amendment.[18/] The court stressed that a pro se complaint was to be held to a less strict standard than complaints drafted by attorneys and that dismissal was only appropriate if it was "beyond a doubt" that prisoners could prove no set of facts that would entitle them to relief.[19/] It remanded the case to the district court to allow the prisoners to file an amendment.

Further, in Bartholomew v. Watson,[20/] Judge Kennedy joined an opinion written by Judge Alarcon holding that prison procedures that precluded an inmate from calling another inmate or a prison staff member as a witness before a disciplinary committee in all cases involving institutional security violated minimal due process. Noting that such testimony is usually the most relevant evidence a prisoner could offer, the court stated that it could not be barred absent a case-by-case determination of the potential hazards

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18/ Id. at 303.

19/ Id.

20/ 665 F.2d 915 (9th Cir. 1982).

flowing from it.[21/] The court affirmed the trial court's finding of unconstitutionality.

21/ Id. at 918.

The Nation Institute.
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December 31, 1987 .

The Hon. Joseph R. Biden
Chairman
Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

Two weeks ago, Audrey Feinberg testified on behalf of The Nation Institute before your Committee on the record of Judge Anthony Kennedy. As she stated, the Institute concluded after extensive research that aspects of Judge Kennedy's civil rights record, particularly in the area of discrimination, were deeply troubling. Moreover, Judge Kennedy's case-by-case method, and his usually short opinions, made it difficult to ascertain his views on key constitutional issues.

Judge Kennedy's testimony did little to allay the Institute's fears. Judge Kennedy avoided making substantive responses to questions in some important areas, and was not questioned at all in other areas. Unless our concerns are addressed by Judge Kennedy, The Nation Institute cannot endorse his nomination.

Our written testimony included twenty suggested questions for the Senate to ask Judge Kennedy. Many of these questions remain unanswered. Moreover, the hearings raised additional concerns. As a result, we have attached an amended list of questions for Judge Kennedy.

We request that you submit these questions to Judge Kennedy before the Committee votes on his confirmation. We also ask that this letter, any written questions to Judge Kennedy, and the responses, be made part of the record and be made publicly available before the vote, so that we and all other interested members of the public can make a fully informed decision on this nomination.

cont'd.

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Emily J. Sack

When our panel was testifying before the Committee, you commented:

> I have grave doubts about Judge Kennedy; grave doubts. And quite frankly, if I was certain that he was going to rule on the bench in the Supreme Court exactly how he has been for the last fifty-two years of his life, I do not see how I could vote for him, to tell you the truth; it would be awfully tough.

We appreciate the honesty of your statement and we share your doubts. We believe, however, that the burden of proof should be on the nominee to relieve these doubts. You and your Committee should not have to guess about a nominee's sensitivity to civil rights and civil liberties issues; failure to satisfy doubts in these critical areas would be doing yourselves and the American public a great disservice.

In this spirit, we hope that you will make certain that the many remaining concerns about Judge Kennedy are fully examined. A position on the Supreme Court is too important to leave to guesswork.

Thank you.

Sincerely,

Emily Sack
Director

ES/sjs

(questions attached)

Questions the Senate Should Ask Judge Kennedy

Discrimination in Employment

1. Do customers' gender preferences excuse employment discrimination?

In Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982) (en banc), cert. dismissed, 460 U.S. 1074 (1983), Judge Kennedy joined a dissent stating that airline passengers' perceived preferences for slender flight attendants might permit the airline to impose strict weight requirements on women but not on men. A majority of the Ninth Circuit rejected this view.

2. Can Congress require affirmative action as a remedy for intentional discrimination?

3. Are the courts powerless to remedy wage disparities between men and women in government jobs requiring comparable education, skills, and effort?

In AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), Judge Kennedy denied relief to women employees with low wages compared to men, based not only on the controversial comparable worth theory, but also based on traditional disparate impact analysis.

Discrimination in Voting Rights

4. In Aranda v. Sickle, 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980), why didn't Judge Kennedy allow the Mexican-American plaintiffs to go forward and try to prove discrimination at a trial?

Judge Kennedy testified that the remedy the plaintiffs sought was not proper. But judges have the authority to decide cases in two steps: liability and remedy. Also, judges often substitute more appropriate remedies for the ones requested by plaintiffs.

Discrimination in Private Clubs

5. Does Judge Kennedy think that the Olympic Club practices invidious discrimination? What is his definition of invidious discrimination?

The ABA Code of Judicial Conduct, Canon 2 commentary (1984) states that it is inappropriate for a judge to belong to a private club that practices invidious discrimination.

Discrimination in Education

6. When racially segregated neighborhood schools are caused by racially segregated neighborhoods, are the courts powerless to intervene?

In Spangler v. Pasadena City Board of Education, 611 F.2d 1239 (9th Cir. 1979), Judge Kennedy concurred in the termination of court supervision of a school board that had been found liable for intentional race discrimination. Judge Kennedy said that neutral school assignment systems in already racially segregated neighborhoods may not represent illegal discrimination by the school board.

7. Under what circumstances, if ever, is school busing a proper remedy for racially segregated schools?

Discrimination in Criminal Law

8. Is the crime of rape of a woman less reprehensible than the crime of forcible sodomy of a man?

In United States v. Smith, 574 F.2d 988 (9th Cir.), cert. denied sub nom. Williams v. United States, 439 U.S. 852 (1978), Judge Kennedy stated that a harsher sentence could be imposed for forcible sodomy than for rape based on traditions and community attitudes. He found no equal protection violation for the different sentences.

Right of Privacy

9. Is there a constitutional right of privacy that protects marriage, contraception, and procreation? What are the boundaries of any such right?

Criminal Law

10. Should the exclusionary rule, that excludes from criminal trials evidence obtained through police misconduct, be limited further?

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court created an exception to the exclusionary rule when police officers relied in good faith on a facially deficient warrant. In United States v. Peterson, 812 F.2d 486 (9th Cir. 1987), a case that had nothing to do with a deficient warrant, Judge Kennedy expanded the "good faith" exception to include situations where American officials incorrectly relied on the assertion by foreign officials that their overseas search was not illegal. How broadly does Judge Kennedy interpret the "good faith" exception? In what additional circumstances other than a facially deficient warrant would he apply this exception?

11. Does Judge Kennedy agree with the Supreme Court's pronouncements that because death is different in its severity and finality from all other sentences, the imposition of capital punishment must be attended by procedural safeguards that might not be guaranteed by the Constitution in other contexts?

12. Should the police ever be required to supply additions to the standard Miranda warnings if a suspect's special circumstances suggest he may unknowingly waive his constitutional rights?

In United States v. Contreras, 755 F.2d 733 (9th Cir.), cert. denied, 476 U.S. 832 (1985), Judge Kennedy affirmed convictions of defendants who mistakenly thought their statements were taken under a grant of immunity.

13. What sorts of errors by criminal defense counsel suggest that he is providing less than the constitutionally required "effective assistance" of counsel?

In United States v. Medina-Verdugo, 637 F.2d 649 (9th Cir. 1980), Judge Kennedy held that "counsel need not be infallible" but only reasonably competent.

14. Should an appellate judge defer in all circumstances to a trial court's determination of effective assistance of counsel?

Judge Kennedy suggested extreme deference in Satchell v. Cardwell, 653 F.2d 408, 414 (9th Cir. 1981) (Kennedy, J., concurring), cert. denied, 454 U.S. 1154 (1982).

Freedom of Speech and Association

15. To what extent do government workers have First Amendment rights?

In Singer v. United States Civil Service Commission, 530 F.2d 247 (9th Cir. 1976), vacated, 429 U.S. 1034 (1977), Judge Kennedy joined in an opinion, later vacated by the Supreme Court, supporting the termination of a government employee for publicly asserting his homosexuality. The employee was active in the Seattle Gay Alliance, had displayed homosexual advertisements in his automobile, and publicly announced his homosexuality.

Judicial Philosophy

16. To what extent should the courts, in interpreting the Constitution, move beyond the framers' initial conceptions of its provisions to a more flexible reading of the ideals and goals it expresses?

17. To what extent should principles of federalism affect the abilities of civil rights litigants to seek redress in the federal courts?

Judge Kennedy has often advocated judicial restraint and vigorous assertion of various principles of federalism, such as abstention, that require that federal courts not hear cases in which state courts are already involved. For example, in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987), Judge

Kennedy, in a concurrence, stated that federal courts should not hear this First Amendment challenge that was also litigated as a zoning dispute in the state courts. In this case, the owner of a dance club challenged zoning requirements and other state laws that would have restricted his club.

18. Does the nominee believe it would be constitutional, as some have proposed, to limit the jurisdiction of Article III courts to eliminate cases involving sexual and racial discrimination, habeus corpus, prisoner civil rights complaints, social security cases, and environmental cases with only limited possibility of review?

Religion

19. Is a short morning prayer conducted in public elementary schools constitutional?

20. To what extent must employers and unions modify their rules and methods to accommodate an employee's religious practices?

Judge Kennedy's opinion in International Association of Machinists & Aerospace Workers v. Boeing Co., Nos. 86-4345, 86-4373 (9th Cir. Nov. 27, 1987) (available Dec. 2, 1987 on LEXIS, Genfed library, Usapp file), upheld a worker's objection to paying union dues on religious grounds.

TESTIMONY FOR

THE NATIONAL ABORTION RIGHTS ACTION LEAGUE

ON THE NOMINATION OF

ANTHONY M. KENNEDY

TO THE SUPREME COURT OF THE UNITED STATES

PRESENTED TO THE

SENATE JUDICIARY COMMITTEE

BY KATE MICHELMAN

EXECUTIVE DIRECTOR

DECEMBER 17, 1987

National
Abortion Rights
Action League

1101 14th Street, N.W., 5th Floor
Washington, D.C. 20005
202-371-0779

Mr. Chairman, Members of the Senate Judiciary Committee, it is an honor to present you with the following testimony concerning the nomination of Judge Anthony Kennedy to the United States Supreme Court. I am Kate Michelman, and I present this testimony on behalf of the National Abortion Rights Action League, a grassroots political organization with a state and national membership of over 250,000 women and men. I am NARAL's Executive Director.

The June 26, 1987 resignation of Justice Lewis F. Powell, Jr. left the Supreme Court divided on many critical issues, including the constitutionality of state laws proscribing or limiting women's access to safe and legal abortion. In the almost 15 years since the Roe v. Wade decision, popular acceptance of women's rights has increased dramatically; yet many state legislatures have continued to deny that their female citizens ought to have the right to control their fertility.[1] Therefore, the willingness of the United States Supreme Court to protect women's reproductive liberty remains crucial to the health and independence of American women.

The nomination of Anthony Kennedy -- who believes that modern constitutional jurisprudence has improperly distorted the Founders' original design, and who has shown marked insensitivity to the nuances of gender-based discrimination -- should be unsettling to those concerned with the health and legal status of women in America. Much like Robert Bork, Kennedy aims his criticisms not at social injustice but at modern civil rights law; in his words, "judicial power without rational restraints is simply the exercise of raw will, the arrogance of power."[2] In practice, this rejection of what he calls "judicial activism" has amounted to an abdication of judicial responsibility to protect individual rights. Because for women reproductive freedom is an essential guarantor of all other rights and liberties, the National Abortion Rights Action League finds Anthony Kennedy a

deeply disturbing candidate for the United States Supreme Court.

A. **The Constitutional Stakes Remain High**

In the thirty-three years since the Brown v. Board of Education decision, a generation has been raised with the inspiration of a Supreme Court devoted to principles of racial equality and respect for individual integrity. And due to the vast improvements in women's legal status, many of us rightfully expect that our government will be rational, fair, and accountable -- that irrespective of our status as female citizens, we will be treated with respect.

The 1973 Roe v. Wade[3] and Doe v. Bolton[4] decisions were among the most significant and symbolic of these improvements. In Roe and Doe, the Supreme Court stated clearly that women's interest in privacy and personal liberty is constitutionally protected and that states may not abridge the traditional common law right to terminate an unwanted pregnancy without violating women's fundamental rights. In the fourteen years since then, in nearly two dozen cases, the Court has systematically reaffirmed that "few decisions are more personal and intimate, more properly private" than those concerning reproduction.[5]

Regaining the legal authority to make conscientious decisions about child-bearing, without fear and without degradation, radically altered the lives of American women. For the ability to control fertility determines whether women can govern their lives; without that power, women spend roughly half their years as slaves to biology and captives of chance. Even when women use the most reliable contraception available, conscientiously, statistics indicate that almost half of them will become pregnant at least once during their reproductive years, without intending to do so and in spite of their best efforts.[6]

And control over reproduction is more than just a matter of biology; it

empowers women with the knowledge that they need not live in fear of another pregnancy, that they have options. Seeing herself less as an incubator and more as an independent, capable person, each woman is free to develop her own sense of identity and self-esteem, and to lead a life of self-determination and dignity.

Often there is a misapprehension that support for reproductive choice, including abortion rights, is selfish, "unnatural," and incompatible with a concern for the well-being of families. In reality, quite the opposite is true. Women are the primary caretakers in our society, and enhancement of the well-being of women is integral to the stability and well-being of their families. Families benefit when women choose to have abortions in order to care adequately for existing children. Families benefit when women choose abortion in order to get education and employment that will allow them to become better providers. Women exercise their reproductive choices in an effort to create the quality family lives that should be possible for all people in our society -- women, men and children equally. They may choose to enlarge their families or not to bear children -- but it is their choice to make.

Because of Roe and Doe, women no longer need to submit to the hazards and terrors of illegal abortions, as history shows they inevitably do when safe and legal abortion services are denied.[7] Thus, both analytically and practically, the right to choose abortion is for women an essential guarantor of all other basic rights and freedoms.

However, our future as a nation devoted to the principle of respect for individual integrity is no longer clear; and for women this is especially frightening. If federal constitutional protection of reproductive decision-making were to be nullified, women could not be secure that state legislatures would respect their reproductive privacy. The states have proven intransigent on the

issue of abortion rights, despite the fact that the vast majority of Americans consistently supports women's privacy.[8]

NARAL's recent study of state abortion laws indicateed that if Roe is overturned, physicians in many states will face criminal abortion statutes with renewed enforceability.[9] Litigation will be necessary in most jurisdictions; in at least half of the states, access to legal abortion will be uncertain. In addition, new restrictive legislation is very likely to be enacted; states will vary substantially in the end, as they did prior to 1973, with many women again suffering the health hazards and cost of interstate travel, and septic abortions.

The array of restrictive laws now on the books leads us to fear that if the Supreme Court grants the states greater authority to limit abortion, the action will be taken as approval of such restrictions and as an invitation to enact them. Those state legislators who have been nominally pro-choice because they tend to favor the status quo may then support a restrictive law because they perceive the new Supreme Court standard as a strong suggestion of what is constitutionally appropriate.

Our basic rights are a matter of principle. They must never be made vulnerable to either the shifting tides of arbitrary public opinion or pork barrel politics. But beyond the fact that it is constitutionally impermissible for the basic rights of any group to be auctioned by a legislature, it is important to note that state legislatures have been and are still peculiarly undemocratic on the subject of women's reproductive rights.

State lawmakers consistently ignore their pro-choice majority constituents. As in the Southern state legislatures following Brown v. Board of Education, state legislative activity is often characterized by hostility to women's rights and a resentment of federal authority. Again like the civil rights struggle of Black

Americans, there has been an organized resistance to women's achievement of basic rights. The strategy of the anti-choice forces has been to sponsor a plethora of restrictive laws, and to flood the courts with legal challenges to Roe v. Wade.[10]

Those who oppose women's right to choose abortion often claim that it was undemocratic for the courts, rather than the legislatures, to have established this rule. In fact, the opposite is true. The history of Connecticut, where the anti-contraception law prompted the Griswold case, illustrates how a majority can fail, despite facially democratic procedures, to influence the legislature when reproductive issues are concerned. The nineteenth-century anti-contraception statute in Connecticut was first targeted for repeal in 1923. Repeal bills were unsuccessful in every session of the legislature for forty years, until finally birth-control proponents lost heart and tried another method -- the courts. Yet Connecticut had one of the lowest birth rates in the nation, indicating widespread use of contraceptives. The resolution of this paradox seems to be that the Catholic Church was powerful enough to threaten reprisals against legislators who were not themselves Catholic.[11] Thus, as late as 1965, Connecticut women had to go to clinics in New York or Rhode Island for contraceptives;[12] and until 1973 they went to New York for legal abortion services, with hazardous delay often resulting from the long-distance travel.[13]

The Founders were wise in not entrusting our liberties to one branch of government only. The system of checks and balances has, on the issue of reproductive privacy, assured that women would not be at the mercy of doctrinaire minorities who may from time to time control the legislative branch of government. The protection of reproductive rights by the Court is an appropriate exercise of their constitutional power.

Judge Kennedy has stated his belief that during the past generation an

"activist" federal judiciary has improperly distorted our constitutional structure. Like Robert Bork, he believes that it is the province of the legislative branch to define the attributes of a "just" society; if citizens find their rights violated by "unjust" laws, that injury should simply spur them to greater participation in the political process.[14] Yet, those who have witnessed with deep sadness and frustration the increasing feminization of poverty and the rejection of the Equal Rights Amendment, as two examples, find such reliance on the legislative process disturbing.

As the Court's 4 - 4 ruling of this past Monday, December 14 in Hartigan v. Zbaraz, regarding Illinois' restrictions on minors seeking abortion services, made clear, the role of the federal courts as protectors of individual rights and liberties is at stake. The Court is similarly split on a variety of other difficult constitutional questions, including remedies for race and sex discrimination, imposition of the death penalty, and the rights of gay people. The nomination of Anthony Kennedy warrants the same careful scrutiny given the rejected Bork nomination.

B. The Reagan Administration's Standards for Judicial Candidates Cause Concern

Careful scrutiny of the Supreme Court nominee is especially important in view of the Reagan Administration's stated goal of politicizing the judicial selection process. President Reagan has twice run for the presidency on a platform that pledged to " . . . work for the appointment of judges . . . who respect traditional family values and the sanctity of innocent human life."[15] From the outset, his administration has made good on that promise -- systematically selecting for the federal bench judges who are loyal to the Reagan social agenda and join his hostility to abortion.

Unlike administrative branch appointments, this purposeful skewing of the federal court system will be a lasting legacy because federal judges are appointed for life. At present, forty-four percent of all current federal judges (333 of 761) are Reagan appointees.[16]

The 1980 and 1984 elections have been falsely cited by the Administration as implying broad public support for Reagan's anti-abortion, anti-family planning policies; polls on reproductive choice consistently show strong public support for the right to choose abortion. Reagan's pledge to remake the Supreme Court was the centerpiece of his 1986 campaign efforts on behalf of Senate Republicans; the voters soundly rejected the candidates and the platform, and transferred control of the Senate back to the Democrats. The Bork confirmation battle showed that Americans overwhelmingly support personal privacy, reproductive choice, and a judiciary that will protect them.

Judge Kennedy stated in his testimony before this committee that he has no "set agenda" with respect to abortion rights. Without questioning his sincerity, NARAL suggests that there may nonetheless be significance in Kennedy's history of pro bono work for the Catholic Church,[17] and the endorsements he has received from such opponents of legalized abortion as Senator Jesse Helms,[18] the National Right to Life Committee and the Pro-Life Action Network. Each Senator should satisfy him or herself regarding Judge Kennedy's intellectual independence from the Justice Department's social agenda before voting on this nomination.

C. Understanding of Kennedy's Judicial Philosophy Is Essential

Appointment to the Supreme Court of the United States is not an entitlement, it is a privilege to be conferred only after a demonstration of fitness in the fullest sense of the word. The burden of proof is on the nominee to show that his

judicial philosophy is appropriate for our nation at this time.

Perception of Kennedy as a moderate, compromise candidate must not be allowed to overshadow his actual record. The Bork hearings established that proper discharge of the Senate's duty to "advise and consent" requires a thorough review of the record -- and that takes time. The White House packaged Robert Bork as a moderate; a full 70 days of careful review proved that label wrong.

A United States circuit judge since 1975, Kennedy has ruled in more than 1400 cases, and has written 450 opinions. Generally, these opinions have been brief and narrow; he has carefully limited himself to the facts of the case before him, and has avoided broad statements and commentary. Unlike Robert Bork, his views appear primarily in these opinions -- there are no published articles and few speeches. As a result, again unlike Robert Bork, Kennedy's overall judicial philosophy has not been immediately obvious. To be fair to both Judge Kennedy and the American public, the Senate must take adequate time to analyze Judge Kennedy's work.

Although he has not had occasion to rule directly on questions of abortion, reproductive rights or personal privacy, Judge Kennedy's decisions in other areas do raise questions about how he views constitutional guarantees of equal justice and women's rights. Upon first reading, the language of his rulings in the civil rights area generally appears mild and receptive to claims of discrimination. Frequently, his decisions have turned on procedural issues, and he has avoided speaking harshly about the merits of a case. In rejecting the argument made by a civil rights plaintiff, he has quite often added that alternative reasoning might prove more promising. And, instead of throwing the case out of court, he has frequently sent it back to the trial court for reconsideration.

Yet, his overall record on race and sex discrimination, criminal law, labor, and other areas is quite disturbing. First of all, women and minorities are able

to prove their cases very rarely. In his court, their burden of proof is extremely high, and he often rejects the trial court's factual findings. Second, in certain of his controversial decisions, he explicitly -- and broadly -- bases the result on his view that marketplace economic forces and business practices are presumptively legitimate.[19] Although the current nominee lacks Judge Bork's harsh language, Kennedy's actions may prove comparable to Bork's in too many cases.

Judge Kennedy has avoided disclosing whether or not he believes that Roe v. Wade was correctly decided; his record shows him to be cautious and careful about speaking solely to those issues before him. Nonetheless, he has stated that justices should readily reconsider constitutional cases they believe to have been wrongly decided. Otherwise, he has not disclosed whether he would be reluctant to overturn or erode Roe. Erosion could well be just as damaging as overturning Roe: either way, the health and well-being of millions of Americans would be adversely affected.

Moreover, the right to choose abortion does not exist in a constitutional vacuum. The Court is charged with producing a coherent theory of individual rights that applies not only to abortion and contraception, but also -- as only a few examples -- to forced sterilization,[20] state restrictions on marriage,[21] and interference with parental rights.[22] The principles that have vindicated abortion rights in more than a dozen Supreme Court cases also undergird the landmark decisions securing American citizens from arbitrary state interference with private relationships. Supreme Court abandonment of these principles would present the horrifying specter of our crowded, high-technology society stripped of its most elementary protection of personal integrity. It is incumbent upon each Senator to be sure that Judge Kennedy's views on the range of "fundamental" individual rights include adequate protection for the family and personal lives of twentieth century

Americans.

In addition, it must be noted that this area of law has continued to develop at a fast-pace in recent years. We are therefore unable to be reassured by predictions that the Court would hold back from overruling Roe. Without explicitly rejecting the right to privacy, or necessarily disturbing other constitutional principles in the family law area, the Court could effectively nullify women's reproductive autonomy in various ways. For example, the Court could alter the standard of review such that states would face a lesser burden of justification for their anti-abortion laws; alternatively, the Court could find an increased constitutional interest in fetal life, which states would be permitted to protect.

Of these two possibilities, the second is especially threatening to women because it could encourage, or even require, states to favor fetal interests over the interests of adult women in a host of extreme ways. State police power might be employed to ensure that women adhere to whatever medical, dietary, exercise, or scheduling regimes a third party deems in the best interests of a developing embryo or fetus. Recent state court interventions in medical contexts to order treatment that pregnant women patients emphatically do not desire,[23] and state criminal prosecutions for "prenatal child abuse"[24] -- on the grounds that a woman failed to follow her doctor's orders -- show that such concerns are not far-fetched.

Conclusion

The National Abortion Rights Action League wishes to impress upon each Senator the seriousness of their constitutional charge in this judicial confirmation process. Although it inspired the founding of our nation, Anthony Kennedy seems to minimize the importance of ensuring that government respects and guarantees the rights of individuals -- the counterbalancing role that the courts must play.

Given our nation's history of institutionalized injustice, he must be seen -- irrespective of his measured language -- as a reactionary when he champions the majoritarian process of state legislatures.

Although he has readily criticized the role of the courts, Judge Kennedy has concealed his views on particular lines of cases. True judicial conservatives honor precedent except in rare cases where they see no justifiable alternative. It is imperative to know how "conservative" Kennedy would be on the high court.

For women in our society, reproductive self-determination is an essential guarantor of all other freedoms. The National Abortion Rights Action League is deeply concerned that Judge Anthony Kennedy's record shows limited sensitivity to the systemic injustices facing women in our society, and the essential role that the federal courts have played and must continue to play in curbing the excesses of legislative majorities. If Anthony Kennedy were to create a majority that no longer recognizes and protects women's right to make personal decisions about childbearing without coercive state interference, his appointment would place the health and well-being of millions of American women and their families in jeopardy. Before making him an Associate Justice of the Supreme Court, therefore, each Senator must be satisfied that he or she has faithfully discharged the duty owed to the millions of female citizens whose lives and dignity are at stake. NARAL urges each member of the Senate to withhold consent to this nomination unless and until he or she is convinced that Judge Kennedy's commitment to the "rule of law" includes a commitment to equal justice that guarantees female citizens their fundamental rights. The Senate cannot afford to be wrong.

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ENDNOTES

1. See National Abortion Rights Action League, Opposition to Bork: The Case for Women's Liberty (October 1987). This report includes the results of NARAL's nationwide study of state criminal abortion laws. Copies are available from the NARAL Foundation.

2. "What is the Role of the Courts in Constitutional Interpretation?, Aug. 21, 1987, at p. 5 (Comments at the Ninth Circuit Judicial Conference).

3. 410 U.S. 113 (1973).

4. 410 U.S. 179 (1973).

5. Thornburgh v. ACOG, 106 S. Ct. 2169 (1986).

17. Hardin, Mandatory Motherhood at 18 (1974). In the chapter entitled "The Indispensible Backdrop," Hardin states that even birth control pills provide only 99% protection, which allows for half a million unwanted pregnancies each year. Less perfect systems have even greater failure rates, such that 97% perfect systems used properly over thirty years produce only a 60% probability of avoiding unwanted pregnancy.

7. Prior to the decision in Roe v. Wade, the mortality statistics correlated to septic abortions had begun to alarm health care professionals; for resorting to illegal or self-induced abortion is not only a humiliating and emotionally damaging experience for women, it is also dangerous and often fatal. In 1962 nearly 1,600 women were admitted to Harlem Hospital Center, in New York City, for incomplete abortions; 701 women were admitted to the University of Southern California-Los Angeles County Medical Center with septic abortions. In 1965, 20% of pregnancy-related deaths nation-wide were due to illegal or self-induced abortion. Six years prior to the Roe v. Wade decision, in 1967, it is estimated that 829,000 illegal or self-induced abortions occurred nation-wide.

8. Approximately 81% of Americans believe that decisions about abortion and childbearing should be left to the woman and her physician. Marttila & Kiley, Inc., "National Survey of Attitudes Toward the Supreme Court and the Bork Nomination," August 1987.

9. See The Case for Women's Liberty, supra note 1.

10. Memorandum by the American Civil Liberties Union Reproductive Freedom Project reporting on "Reversing Roe v. Wade Through the Courts," an Americans United for Life conference, held on March 31, 1984 in Chicago, Illinois. Copies are available from the NARAL Foundation.

11. C. T. Dienes, Law, Politics and Birth Control at p. 146 (1972).

12. Planned Parenthood League of Connecticut, Scrapbook, pages unnumbered (1983). On file with the National Abortion Rights Action League.

13. Alan Guttmacher Institute, Issue in Brief, "Abortion in the U.S.: Two Centuries of Experience," January 1982.

14. Unenumerated Rights and the Dictates of Judicial Restraint, Speech given at the Canadian Institute for Advanced Legal Studies, The Stanford Lectures, July 24 - Aug. 1, 1986, at p. 3-5, 21.

15. See National Republican Party Platform, 1980 and 1984, copies available from the NARAL Foundation.

16. Wall Street Journal, Dec. 2, 1987, at p. 28.

17. D. Willman, "Church lobbying reported," The Philadelphia Inquirer, Dec. 15, 1987, at 12-A.

18. C. Thomas, "Helms talks to Kennedy," Washington Times, Nov. 23, 1987, at D4.

19. See, e.g., AFSCME v. Washington, 770 F.2d 1401 (1985); Kaiser Engineers v. NLRB, 538 F.2d 379 (1979).

20. See Skinner v. Oklahoma, 316 U.S. 535 (1942)(invalidated the Habitual Criminal Sterilization Act, which provided for compulsory sterilization after conviction of a third felony involving "moral turpitude"; the Court noted that "marriage and procreation are fundamental").

21. Zablocki v. Redhail, 434 U.S. 374 (1978)(struck a law requiring court approval for the remarriage of any person under an obligation to pay child support; freedom to marry is "fundamental" and any state restrictions must undergo the strictest scrutiny); Loving v. Virginia, 388 U.S. 1 (1967) (struck a law against inter-racial marriage because, in violation of the equal protection and due process guarantees of the Fourteenth Amendment, it interfered with the "fundamental freedom" to marry).

22. See Stanley v. Illinois, 405 U.S. 645 (1972)(although not married to the deceased mother, a father had an important interest in the care and companionship of his children and so was entitled at least to a hearing before the state removed them for placement elsewhere); Moore v. City of East Cleveland, 431 U.S. 494 (1977) ("nuclear family" zoning ordinance that prevented a grandmother from living with her two grandsons violated their Fourteenth Amendment due process rights with respect to family privacy and libert

23. See, e.g., In re: A.C., No. 87-609 (D.C. App. Nov. 10, 1987).

24. See, e.g., People of California v. Stewart, No. M508197 (Cal. Mun. Ct. San Diego Cty., filed Sept. 26, 1986).

National Association of Women Judges

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January 7, 1988

Honorable Joseph Biden
Senate Judiciary Committee
246 Dirkson Senate Office Building
Washington, D.C. 20510

Re: Senate Judiciary Committee Hearings on Nomination of Judge Anthony M. Kennedy

Dear Senator Biden:

The National Association of Women Judges (NAWJ) is desirous of being on record at the hearings of the Senate Judiciary Committee to determine whether the Senate will consent to President Reagan's nomination of Judge Anthony M. Kennedy to the United States Supreme Court.

Over two-thirds of all women judges sitting in courts of record in the United States are affiliated with the NAWJ and subscribe to its stated purposes.

One such purpose, to which the Association is deeply committed, is the promotion of the fair administration of justice.

National Judicial Education Program

In that regard, the Association and individual members thereof have been involved on the state and national level with certain projects. One such project is the National Education Program to Promote Equality for Women and Men in the

Courts, directed by Lynn Hecht Schafran, Esq. These Programs enable judges to understand how stereotypes, myths and biases about the nature and role of women and men affect fact-finding and decision-making and courtroom interaction. They were the catalysts for the establishment of about 15 task forces by state chief justices throughout the nation to document gender bias in their own court systems and to recommend ways to eliminate it.

NAWJ is very proud of its involvement with this Project from the Project's inception, supporting it with funds from the Women Judges Fund for Justice, and with the personal participation of members.

American Bar Association (ABA) Judicial Canons

Another project to which many members have devoted time and energy, is the effort to get the ABA to amend its code of judicial conduct relating to membership in clubs with discriminatory membership policies. This long, tedious, on-going struggle to date has resulted in the ABA's adoption of only a Commentary to its judicial Canon 2.

Canon 2 proclaims "A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS [SIC] ACTIVITIES." The Commentary thereto states:

"It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women, and others, that the judge's impartiality is impaired. . . ."

The NAWJ strongly believes the ABA should embrace a canon similar to the one adopted by the California judiciary in 1986.

Modification of California Judicial Canons

California has some 1400 judges, almost all of whom belong to the California Judges Association. Its judiciary boasts a substantial and growing contingent of women judges, the majority of whom are members of the NAWJ. These persons, in cooperation with like-minded male judges, finally were able at the annual conference in 1986 to convince the California Judges Association membership to adopt the following canon:

"C. It is inappropriate for a judge to hold membership in any organization, excluding religious

organizations, that practices invidious discrimination on the basis of race, sex, religion or national origin."

Judge Kennedy's Position

Because of the NAWJ's commitment to the fair administration of justice and because of its leadership role, it is incumbent on the Association to express its concerns with Judge Kennedy's recent, albeit past, membership in at least one all-male club in California.

He was a member of long standing in the Olympic Club, which refuses to admit women members, until shortly after his name was circulated for the Supreme Court vacancy. Such lengthy membership raises questions as to his sensitivity in the area of gender bias.

The NAWJ fervently hopes this Honorable Committee will make a thorough and complete inquiry of Judge Kennedy on this subject and satisfy itself in the premises.

Indeed, the Association would urge similar inquiries on the matter of gender bias to be put to all federal judicial nominees coming before this Committee.

Conclusion

The NAWJ appreciates the opportunity to express these views to this Committee. The Association further looks forward to continuing its pursuit of a bias-free judiciary, and its efforts to increase the numbers of women in the federal judiciary, hopefully, with the assistance of this Honorable Committee.

Respectfully submitted,

Judith McConnell

Honorable Judith McConnell
President

JM:lc

National Democratic Policy Committee

P.O. Box 17729 • Washington, D.C. 20041-0729

Senator Joseph Biden,
Chairman, Senate Judiciary Committee
224 Dirksen Building
Washington, D.C.

RE: CONFIRMATION OF JUDGE ANTHONY M. KENNEDY
AS ASSOCIATE JUSTICE OF THE SUPREME COURT

Dear Senator:

I submit herewith my testimony on the confirmation proceedings.

The nomination of Judge Kennedy occurs at a point the world is in the opening phases of the biggest financial collapse in history. If the follies of the Hoover administration and Congress, during the years 1929-1932, were to be repeated, the magnitude of the financial collapse will reach levels by sometime during not later than 1989, plunging the world into an economic depression comparable to that Europe has not suffered since the fourteenth century, with a potential impact on the United States comparable to that which afflicted Weimar Germany during the years 1929-1932.

It is commonly assumed, from legends of the 1930s, that a deep economic depression must follow such a deep financial collapse, as night follows day. That assumption is in error. Financial collapses do not cause economic depressions; rather, depressions are caused by the blunders, both of commission and omission, committed by governments in response to a financial crash.

The United States has suffered financial calamities before; indeed, our present form of Federal government was first inaugurated in the midst of what seemed to many a virtual state of national bankrupcty. We have escaped from each of these crises, to levels of prosperity greater than ever before.

There is no reason that the present financial collapse should be an exception to that. Each time, we met and overcame the crisis without proof of need to tamper with any provision of our Constitution, or by any abrogation of our liberties. There is no need to do so now.

Nonetheless, in the sheer magnitude of the present crisis, there is a danger. The danger is, on the one hand, that some may be tempted to copy forms of austerity seen during the last years of Germany's Weimar Republic, leading our nation down the road to some hideous tyranny, as occurred in Germany then. The second danger is, that the three branches of our Federal government might become engaged in a quarrel over required measures, and that out of the floundering into which we might be plunged so, a combination of actions and inactions might foster that spirit of desperation in which some tyrannical folly might be fostered.

In such circumstances, more than ever before during the post-war period to date, we require an appropriate composition of the justices of our Supreme Court. I set forth summarily, the manner in which I see this connection more concretely.

Any crisis of the sort into which we have entered now, is, by its very nature, the outcome of an accumulation of wrong policies by our government up to the point at which the crisis has erupted. The challenge to government at such a point, is either to uproot and replace the policies which have fostered the calamity, or to attempt to defend those wrong policies, and thus plunge the nation into disaster. So, government is faced with the choice, either to make such relatively drastic changes in long-embedded policy, and that in a brief span of time, or to court incalculable disaster for refusing to do so.

Any such sudden reversal in the mass of accumulated monetary, economic, and fiscal policies over the recent twenty years, threatens to become a constitutional crisis. Although, in the present instance, no innovations are needed which are contrary to the clear intent of the founders of our republic, the mere fact that we have become accustomed to present monetary, economic, and fiscal policies for so long, tends to color them with an assumed force of precedent in constitutional law. The next President, and the next Congress will be confronted with the latter form of crisis.

In this circumstance, it is urgent that the composition of the justices of our Supreme Court tend to view the matter in the way I have indicated. In short, they must place the lesser weight on precedents of the recent twenty years, and find the preponderance of authority in the traditions which preceded the past twenty years, our original and prolonged tradition as a nation committed to scientific and technological progress in a capital-intensive, energy-intensive mode.

There are three leading errors in policy-making, accumulated over the recent twenty years, whose correction, or absence of such correction will decide whether our nation avoids a deep economic depression, or slides into the worst calamity in our history. These are the introduction of a

neo-malthusian drift toward what is often called "post-industrial society," the replacement of the pre-1968 form of a gold-reserve monetary system of relatively stable parities, by what is called a "floating exchange-rate" monetary system, and an anti-scientific, anti-technology bias contributed by a growing radical counterculture. Many precedents in statute and judicial decisions have embedded these three innovations into our official practice and doctrine; these are the precedents which are threatening to destroy our nation during the period ahead.

If justices of the Supreme Court view these matters so, and also view these matters from the standpoint of intent of our Declaration of Independence and Federal Constitution, that Court will be no obstacle to the necessary actions of President and Congress, to the degree these necessary actions are indeed consistent with the original intent of the law of our republic. If the Court is of a contrary opinion, that contrary view could foster a national catastrophe.

Judge Kennedy appears a man qualified in his profession and of good character, I know of no fault in him on that account. His appointment to that body must be assessed on two principal grounds. First, his philosophy of constitutional law: does he embrace the elaboration of natural law embodied in the Declaration of Independence and Constitution, and with such efficiency that he were disposed to uphold the overriding of faulty precedents accumulated during the past twenty years? Second, is he likely to become an effective advocate of that persuasion among his peers on the Court?

Ordinarily, great weight must be given to a President's nomination of a justice of our Supreme Court. However, at this juncture our President remains a stalwart advocate of those policies which have brought us into the present financial crisis, to such a degree that his views on these matters must tend to color his judgment in selecting an appointment. This matter must be examined, in the view that we can not mortgage the future to those ideological habits from the recent past now being discredited in fact. As the Preamble of our Constitution instructs all who take the oath, it is to our posterity we are indebted as much as to present and recent opinion.

Respectfully Yours,

Lyndon H. LaRouche, Jr.
Chairman Emeritus
Advisory Council, NDPC

STATEMENT OF THE
NATIONAL LAWYERS GUILD
AND THE
CENTER FOR CONSTITUTIONAL RIGHTS
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF
ANTHONY M. KENNEDY
TO THE UNITED STATES SUPREME COURT

INTRODUCTION

The National Lawyers Guild and the Center for Constitutional Rights are opposed to the nomination of Judge Anthony Kennedy to the Supreme Court. We believe that a justice of the Supreme Court must affirmatively demonstrate a commitment to civil rights and civil liberties and not merely be "not as bad as Judge Bork." We hope that members of Congress and organizations who opposed Judge Bork insist that the American people have a right to a justice who will truly do justice. Judge Kennedy is not such a nominee.

The National Lawyers Guild is an organization of 9,000 members that has for 50 years worked for the ideals of justice, equality, fairness and human dignity. We have supported: the struggles of blacks, latinos, women and other minorities to achieve full and equal citizenship; working men and women in their efforts to achieve the basic right to organize into unions, to bargain collectively and to a fair wage and safe working environment; the rights of gays and lesbians to equal protection of the laws and to be free from the imposition of intolerant legislatures' moral views; the rights of the accused to due process and the right for all citizens to be free from arbitrary and coercive police practices; the full protection of our rights to free expression, association and political change; and the independence of lawyers who challenge governmental

policies.

We are proud to represent the many lawyers who are involved in the constant struggle to achieve a fair, just and equitable society and we are proud to have played a role in protecting the rights of those courageous people who have participated in the great social and legal struggles of our times.

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to advancing and protecting the Rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1967 to aid the southern civil rights movement, the CCR soon became an important legal force in challenging unconstitutional government conduct and in protecting the civil rights of oppressed groups. Today, CCR litigates scores of civil rights cases on behalf of women, Blacks, Latinos, Indians, Gays and Lesbians. CCR's voting rights project in the South has filed numerous cases challenging at-large elections and other schemes for diluting minority strength.

WHY WE OPPOSE JUDGE KENNEDY

Judge Kennedy repeatedly rules against constitutional and statutory rights asserted by women, homosexuals, Blacks, Latinos, Indians, aliens and prisoners. His opinions express a strong pro-business, anti-union and anti-employee bias. He favors the death penalty and has watered down the protection against

illegal searches and seizures protected by the Fourth Amendment. He has been criticized for ignoring the proper role of an appellate judge and substituting his judgment for that of the trial court in order to reach the result he desires. While he may not have espoused a philosophy as pernicious as that of Judge Bork's, he reaches similar retrograde results.

In certain areas, such as the First Amendment, he has not expressed unmitigated hostility toward litigants' rights. This is true in selected criminal cases as well. However, these limited exceptions do not overcome a narrow view of civil and constitutional rights which does not guarantee justice for all.

WOMEN'S RIGHTS

Two decisions in the area of women's rights are particularly striking. In AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985) he reversed the trial court and held that a class of 15,000 employees of the State of Washington failed to establish a Title VII sex discrimination claim despite overwhelming evidence that the women employees were receiving lower wages than men for comparable work. This was despite the State's admission that such discrimination had taken place. Judge Kennedy permitted such discrimination because, in his view, it was based upon the free market system and the law of supply and demand. In other words, if discrimination is rooted in

the society it is allowable.

Judge Kennedy concurred in a dissenting opinion in Gerdon v. Continental Airlines, 692 F.2d 602 (9th Cir. 1983) applying a similar analysis to a claim by airline flight attendants that strict weight requirements for women and not for men were discriminatory. The airlines' justification was not safety, but rather that its passengers preferred being served by attractive women. Fortunately, the majority refused to accept this as a legitimate reason and held it discriminatory on its face. However in another decision, White v. Washington Public Power Supply Commission, 692 F.2d 1286 (9th Cir. 1982) he ruled, contrary to other courts, that section 1981 of the Civil Rights Act applied only to discrimination against Blacks and did not protect women. These decisions reflect actions in his personal life. Until a short time ago he belonged to the Olympic Club in San Francisco, a club that permitted no women members. (He resigned because he knew he was being considered for the Supreme Court.)

GAY AND LESBIAN RIGHTS

Judge Kennedy, like Judge Bork, authored an opinion upholding the right of the Navy to discharge personnel who engaged in homosexual conduct. Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) Rather than decide whether such conduct was a fundamental aspect of the right to privacy, he accepted the claim of the Navy

that military necessity justified the dismissal of homosexuals. While referring to the Supreme Court decisions protecting privacy and the right to abortion, notably absent was any affirmation that he affirmed or adopted the reasoning of those cases.

In an earlier case, Singer v. U.S. Civil Service Commission, 530 F.2d 247 (9th Cir. 1976). Judge Kennedy signed on to an opinion which allowed a gay activist to be dismissed from his government job for being, according to the Civil Service Commission, "an advocate for a socially repugnant concept." The Supreme Court vacated the decision saying an employee cannot be summarily discharged without some showing that his or her homosexual conduct is likely to impair the efficiency of the Civil Service. The Singer reversal might well explain Kennedy's toned-down language in Beller v. Middendorf. The result is the same -- mandatory dismissal -- but Kennedy reaches for language about the "special needs of the military" to justify the result.

RACIAL DISCRIMINATION

Decisions in the area of racial discrimination demonstrate that Judge Kennedy has no understanding that laws protecting racial equality are to be broadly and liberally construed. His decision in Topic v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976) denied access to the courts to a fair housing organization and homeowners

against a group or realtors involved in racial steering. To reach this result he had to bend previous Supreme Court decisions and reject the reasoning of a number of other courts. Three years later, in an opinion by Justice Powell, the Supreme Court by a 7-2 margin rejected Judge Kennedy's position. In Spangler v. Pasadena Board of Education, 611 F.2d 1239 (9th Cir. 1979) a school desegregation case, Judge Kennedy concurred in the result by writing a long opinion which disregarded important principles of judicial fact-finding and gave a narrow view of the constitutional right to attend desegregated schools.

VOTING RIGHTS

In what could have been a disaster for voting rights litigation, Judge Kennedy wrote a long concurrence rejecting a challenge to at-large voting by Latinos in California, Aranda v. VanSickle, 600 F.2d 1267 (9th Cir. 1979). His analysis not only set forth a requirement of invidious intent for such challenges to be heard, but determined facts in a manner that allowed him to reach the result he desired. This decision essentially held up voting rights litigation in the 9th Circuit until 1982 when Congress, by legislation, overruled the narrow way in which Judge Kennedy and some other judges had read the Voting Rights Act.

NATIVE AMERICANS

Indians, like other minorities, have not fared well in cases decided by Judge Kennedy. In Oliphant v. Schile, 544 F.2d 1007 (1976), a case challenging the right of an Indian tribe to try non-Indians for offenses committed on the reservation, Judge Kennedy dissented from permitting the tribe such jurisdiction. He labeled the idea that Indian tribes had inherent sovereignty to try such offenses as novel, and inconsistent with prior practice. In Blackfeet Tribe of Indians v. State of Montana, 729 F.2d 1192 (1984), Judge Kennedy joined a dissent which demonstrated hostility toward the principle that ambiguities in statutes are to be resolved in favor of Indians. This is one of the cardinal principles of Indian law.

IMMIGRATION

While Judge Kennedy claims to understand that neither the Immigration and Naturalization Service nor the Bureau of Indian affairs "inspire confidence", he refuses to do very much about their errors. Villena v. INS, 622 F.2d 1352 (9th Cir. 1980). His position is that review of deportation proceedings should be quite narrow, that the courts should give deference to administrative proceedings and be primarily concerned with rules and procedures and not individual cases.

LABOR

His rulings in the labor area are particularly egregious. His greatest number of dissents are from decisions enforcing union rights. For example, when union members lobbied congress to protect their jobs from foreign competition, a position contrary to that of the company's, he dissented from a decision upholding an unfair labor practice against the company for disciplining the employees. Kaiser Engineers v. National Labor Relations Board, 538 F.2d 1379 (9th Cir. 1976).

PRISONERS

In United States v. Goveia, 704 F.2d 1116 (9th Cir. 1983), Judge Kennedy joined a dissent from a ruling holding that prisoners had a right to counsel when they had been placed in administrative detention when the detention was due to a pending investigation or trial.

ENVIRONMENT

In Libby Rod and Gun Club v. Poteat, 594 F.2d 742 (9th Cir. 1979), the court found that Congress did not authorize the building of a dam which would have caused environmental damage. Judge Kennedy dissented and found that congressional appropriations were sufficient to authorize the dam and that a specific authorizing statute was not necessary. This ruling has implications in other than environmental areas. For example, a

frequent claim by administrations is that congressional funding is the equivalent of a declaration of war under the Constitution. Apparently, Judge Kennedy would agree with this reasoning.

INDIVIDUAL RIGHTS CASES

Judge Kennedy appears to have little compassion for the individual asserting his or her rights and rarely favors "the little guy." He often finds technical grounds for getting rid of such cases.

In EEOC v. Alioto Fish Co., Ltd., 623 F.2d 86 (9th Cir. 1980), he authored an opinion upholding the dismissal of an employment discrimination case because the EEOC did not file its law suit until 62 months after the employee filed her charges against the employer with the EEOC. The fact that the employee had no control over an EEOC office that was being gutted by the Reagan Administration did not prevent her from being penalized because of the EEOC's dereliction of its duties.

In another case, Koucky v. Department of the Navy, 820 F.2d 300 (9th Cir. 1987), the Court of Appeals, again in an opinion authored by Judge Kennedy, threw out a lawsuit against the Department of the Navy by a handicapped former naval employee because the lawsuit named the "Department of the Navy" as a defendant when it should have named the "Secretary of the Navy." Furthermore, the Kennedy court would not allow the claimant to amend his pleadings, deciding instead to

adhere to a rigid thirty day time bar. As a result, the plaintiff was not allowed to litigate his case.

In yet another civil rights case, a Native American woman succeeded in winning a $161,000 award in an employment discrimination case from a trial court. Apparently convinced that the amount awarded was not sufficient to cover compensatory and punitive damages, back pay, and attorney's fees, she appealed to the Court of Appeals. Focusing entirely on the arguments of the employer. Kennedy wrote an opinion for the Court overturning the monetary award and ordering the plaintiff to try her case anew. Thus, in her quest to obtain more justice, the plaintiff was deprived of all justice. See, White v. Washington Public Power Supply System, 792 F.2d 1286 (9th Cir. 1982).

The issue is not whether Judge Kennedy is as bad as Judge Bork. Rather, it is whether we want a Supreme Court and Supreme Court Justice that will build on the civil rights and civil liberties gains of the past years. We at the Center for Constitutional Rights do. We feel that Judge Kennedy will not move us forward; we are fearful he will move us backward.

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United States Justice Foundation

TESTIMONY IN SUPPORT OF THE NOMINATION OF
THE HONORABLE ANTHONY M. KENNEDY
TO THE UNITED STATES SUPREME COURT

During his twelve (12) year tenure as a Judge on the United States District Court of Appeals, the Honorable Anthony M. Kennedy has participated in over one thousand four hundred (1,400) decisions and has authored over four hundred (400) opinions. He has served a distinguished career on the Federal bench, and, as a result of his experience, his legal abilities, and his integrity, he has gained the support of a wide spectrum of individuals and organizations for his nomination.

As you part-take in this confirmation process, I urge you, as a representative of the citizens of your state, to take into consideration the experience, abilities, and integrity of Judge Kennedy. I pray that you will not be swayed by the attacks on Judge Kennedy by those who oppose any nominee to the United States Supreme Court that is put forth by President Reagan. During the retention election for the California State Supreme Court in 1986, cries were heard from all over the State of California that then Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin should be voted upon on the basis of their abilities, and not on the basis of their ideological beliefs. I would respectfully suggest that these cries be heeded in this instance and that you vote to confirm Justice Kennedy as an Associate Justice on the United States Supreme Court.

Respectfully Submitted,

Gary G. Kreep
Executive Director
United States Justice Foundation

GGK:aem

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COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NOMINATION HEARINGS OF JUDGE ANTHONY M. KENNEDY
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

WITNESS LIST

Monday, December 14, 1987

Senator Pete Wilson (R-California)
Representative Robert T. Matsui (D-California)
Representative Vic Fazio (D-California)

Judge Anthony M. Kennedy

Tuesday, December 15, 1987, 9:30 A.M.

Judge Anthony M. Kennedy

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NOMINATION HEARINGS OF JUDGE ANTHONY M. KENNEDY
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

WITNESS LIST

Wednesday, December 16, 1987, 9:30 A.M.

American Bar Association:
Harold Tyler, Chairman, Standing Committee on the Federal Judiciary of the American Bar Association, New York
J. David Andrews, Member, Standing Committee on the Federal Judiciary of the American Bar Association, Ninth Circuit, Seattle, Washington
John C. Elam, Member Standing Committee on the Federal Judiciary of the American Bar Association, Sixth Circuit, Columbus, Ohio
John D. Lane, Member, Standing Committee on the Federal Judiciary of the American Bar Association, Federal Circuit, Washington, D.C.

Laurence Tribe, Professor of Constitutional Law, Harvard Law School

Erwin Griswold, former Dean, Harvard Law School; former Solicitor General

Panel:
Molly Yard, President, National Organization for Women, Inc.

Joseph Rauh, Jr., Vice Chairman, Americans for Democratic Action, Inc.

Susan Deller Ross, Professor, Georgetown University Law Center; NOW Legal Defense and Education Fund

Jeffrey Levi, Executive Director, National Gay & Lesbian Task Force

Panel:
Gordon Schaber, Dean,
McGeorge School of Law, University of the Pacific

Leo Levin, Professor,
University of Pennsylvania Law School

Wendy Collins Perdue, Professor,
Georgetown University Law Center

Susan Westerberg Prager, Dean,
University of California at Los Angeles School of Law

Panel:
Michael Martinez, National President,
Hispanic National Bar Association

Audrey Feinberg, Consultant,
The Nation Institute

Antonia Hernandez, President and General Counsel,
Mexican American Legal Defense and Educational Fund

Scott Wallace, Legislative Director,
National Association of Criminal Defense Lawyers

Kristina Kiehl, Chair, Voters for Choice

Panel:
Forrest Plant, Partner, Diepenbrock, Wulff, Plant & Hannegan;
former President, California Bar Association

Carolyn Kuhl, Partner, Munger, Tolles & Olson, Los Angeles;
former Deputy Solicitor General

Robert Cartwright, Partner, Cartwright, Sucherman & Slobodin, Inc., San Francisco;
former President, American Trial Lawyers Association;
former President, San Francisco Bar Association

Nathaniel S. Colley, Sr., Partner, Colley, Lindsey and Colley, Sacramento

Elizabeth Y. Kepley, Director of Legislative Affairs,
Concerned Women for America

Paul Bator, Professor,
University of Chicago Law School

Panel:

Johnny Hughes, Executive Director,
National Troopers Coalition

Jerald R. Vaughn, Executive Director,
International Association of Chiefs of Police

Dewey R. Stokes, National President,
Fraternal Order of Police

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